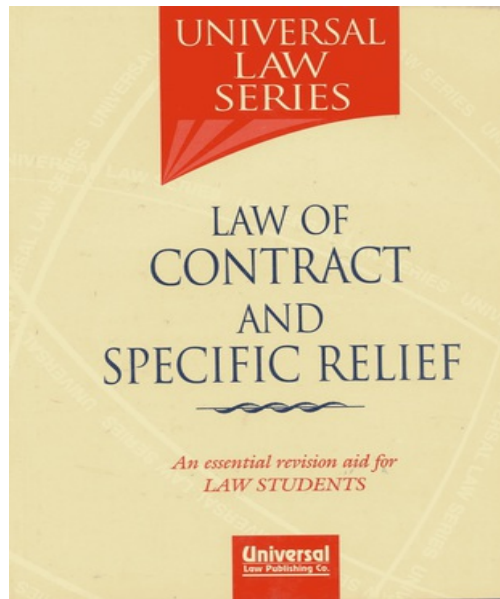
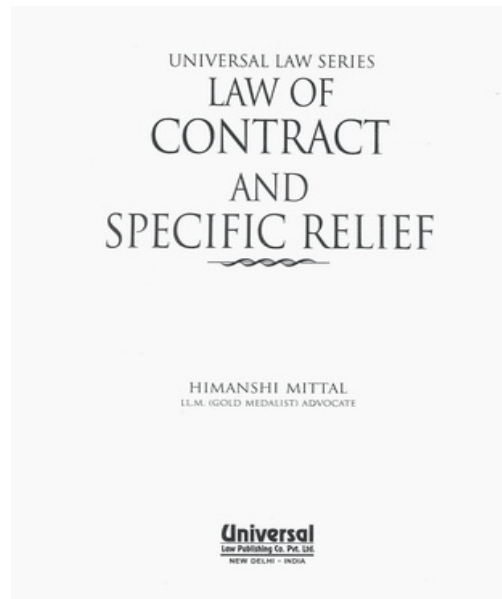


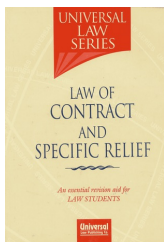
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Part I

THE INDIAN CONTRACT ACT, 1872

(9 of 1872)

Preamble.-Whereas it is expedient to define and amend certain parts of the laws relating to contracts.

It is enacted as follows:-

Chapter I

PRELIMINARY

Section 1: Short title.-This Act may be called the Indian Contract Act, 1872.

Extent, Commencement.-It extends to the whole of India except the State of Jammu and Kashmir and it shall come into force on the first day of September, 1872.

Saving.-Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

Interpretation clause.-In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
- (c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee".
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement;
- (f) Promises which form the consideration or part of the consideration for each other, are called reciprocal promises;
- (g) An agreement not enforceable by law is said to be void;
- (h) An agreement enforceable by law is a contract;
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Agreement and Contract

Contract.-According to section 2(h) of the Indian Contract Act, 1872-"An agreement enforceable by law is a contract."

According to Anson: "A Contract consists in an actionable promise or promises. Every such promise involves two parties a promisor and promisee and an expression of a common intention and of expectation as to the act or forbearance promised."

All agreements are not enforceable by law and therefore, all agreements are not contracts. Some agreement may be

enforceable by law and others are not. For example, An agreement to sell a radio set may be a contract but an agreement to go to see a movie may be a mere agreement and not enforceable by law.

This contract is a bilateral transaction between two or more person. Every contract has to go through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter proposals as also the consideration resulting finally in the acceptance of the proposals.

Tarsem Singh v. Sukhminder Singh, MANU/SC/0158/1998 : AIR 1998 SC 1400 (1403): under law it is not necessary that every contract must be in writing. There can be an equally binding contract between the parties on the basis of oral agreement unless there in law which requires the agreement to be is writing.

Essentials of Contract

What are the basic essentials of valid contract?

Section 10 of Indian Contract Act, 1872.-All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Railways invited tenders for the supply of jaggery to the railway grain shops. The respondent submitted his tender for the supply of 14000 imperial maunds of cane jaggery during the month of February and March and the tender was accepted by the latter. So far, the offer of a supply of a definite quantity of jaggery during a specified period at a certain rate and the acceptance of the offer would constitute an agreement, but would fall short of amounting to a legal contract inasmuch as the date of delivery of the jaggery was not specified.

Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses or any law relating to the registration of documents.

According to section 10, an agreement to be enforceable must fulfil the following conditions:-

- (i) An agreement between the two parties. An agreement in the result of a proposal or an offer by one party followed by its acceptance by the other;
- (ii) Agreement should be done between the parties who are competent to contract;
- (iii) There should be lawful consideration and lawful object in respect of that agreement;
- (iv) There should be free consent of the parties, when they enter into the agreement;
- (v) The agreement must not be one, which has been expressly declared to be void.

CHAPTER II

PROPOSAL OR OFFER

The term 'proposal' has been defined in section 2(a) of the Indian Contract Act, 1872 as follows:-

"When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

The first step in the formation of a contract is the making of a proposal. Generally speaking there must be at least two persons to make a contract-A person to make the proposal and the other person to accept it.

According to section 2(c).-

The person making the proposal is called the promisor and the person accepting the proposal is called the promisee.

A proposal to be valid must contain the following essential elements which are:-

- (i) There must be two parties;
- (ii) Every proposal must be communicated;
- (iii) It must be made with a view to create legal relation;
- (iv) It must be certain and definite.

What are the basic essentials of valid contract?

Essential of a Valid Proposal

A contract come into existence only when all the terms and conditions have been finalised. If the facts of a particular case show that execution of a written contract was a condition precedent for forming into force of the contract between the parties, then it cannot be said that any concluded contract in absence of a written contract being executed has come into force between the parties. The essentials are as follows:-

1. The Proposal must be Communicated

Section 2(a) of the Indian Contract Act, 1872 explains that a person is said to make a proposal "when he signifies to another person his willingness to do or to abstain from doing anything". The emphasis, here is upon the requirement that the willingness to make a proposal should be signified. The term signify means to communicate to make known. It means that the proposal should be communicated to the other party. The process of making a proposal is completed by the act of communicating it to the other party.

What principle is laid down in section 3?

Section 3: Communication, acceptance and revocation of proposal.-The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Felthouse v. Bindley, (1863) 7 LT 835: An offer is accepted when the acceptance is communicated. The communication must be made to the offerer and a communication of acceptance made to a third person creates no contract.

Pharmaceutical Society of Great Britain v. Boots Cash Chemicals (Southern) Ltd., (1952) 2 QB 795: The exposure of goods by a shopkeeper does not amount to an offer to sell. On picking the goods, it is an offer by the customer and sale is not affected until the buyer's offer price is accepted by the shopkeeper.

What principle is laid down in the case of Lalman Shukla?

Lalman Shukla v. Gouri Dutt, 1913 All LJ 489: To create a contract it is necessary that a proposal should have been communicated to the propose. An uncommunicated proposal cannot be accepted. The plaintiff did not have the knowledge of the proposal. The case was dismissed.

Section 9: Promises, express or implied.-"Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."

State of Maharashtra v. Saifuddin Mujjaffarli Saifi, MANU/MH/0008/1994 : AIR 1994 Bom 48: A contract can be implied and it is very clear from section 9 of the Contract Act, but it is a fundamental principle of law that the court should not make a contract for the parties. A contract implied in fact requires meeting of minds. The court should refuse to read an implied term into a contract which is silent on the point or did not clearly indicate the nature of the term. However, when the stipulations

are clear and in contemplation of the parties or which necessarily arise out of the contract between the parties, they will be implied.

Upton Rural District Council v. Powell, (1924) 1 All ER 220: A fire broke out in the defendant's farm. He believed that he was entitled to the free services of Upton Fire Brigade and, therefore, summoned it. The Brigade put out the fire. It then turned out that the defendant's farm was not within free service zone of the Upton, which, therefore, claimed compensation for the services.

The court said-The, truth of the matter is that the defendant wanted the services of Upton, he asked for the services of Upton and Upton, in response to that request provided the services. Hence, the services were rendered on an implied promise to pay for them.

Explain with example when the communication is complete.

Section 4: When communication is complete.-The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

Illustration.-A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

2. Proposal must be certain

Section 29: Agreements, the meaning of which is not certain, or capable of being made certain are void.

Illustration:

(a) A agrees to sell 'B' "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A, who is a dealer in Coconut oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of Coconut oil.

3. Intention to Create Legal Relationship

Whether it is necessary to create legal relationship for a valid contract?

The intention of the parties is naturally to be ascertained from the terms of the agreement and the surrounding circumstances. According to Lord Atkin- "There are agreement between parties who do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and acceptance of hospitality". They are not contracts because parties did not intend that they shall be attended by legal consequences.

Explain the facts of Balfour v. Balfour case.

Balfour v. Balfour, (1919) 2 KB 571: The defendant was employed in Ceylon. He along with his wife went to England to enjoy the leave. At the expiry of leave when he was about to return Ceylon, his wife was advised to remain in England on account of her health. Before returning to Ceylon, he promised to pay ₹ 30 every month to his wife for her maintenance. He sent the amount for sometime but subsequently he stopped it as certain differences between them led to their separation. Since by the time of separation, the said allowance had fallen into arrears, the wife brought to an action to recover the arrears. Her claim was dismissed by court.

These arrangements do not result in contracts at all, even though there may be what would constitute consideration for the agreements. They are not contracts because parties did not intend that they shall be attended by legal consequences.

Lord Atkin observed that - "To create a contract, there must be a common intention of the parties to enter into legal

relationship, mutually communicated expressly or impliedly."

Banwarilal v. Sukhdarshan Dayal, MANU/SC/0013/1972 : (1973) 1 SCC 294: In an auction sale of plots of land, a loudspeaker was spelling out the terms etc., of the sale. One of the statements being that a plot of certain dimensions would be reserved for a Dharamshala (Public Inn). Subsequently, that plot was also sold for private purposes. The purchasers sought to restrain this.

The Supreme Court observed that Micro Phones... have not yet acquired notoriety as carriers of binding representation. Promises held out over loudspeakers are often claptraps of politics. In the instant case, the announcement was, if at all, a puffing up of property put up for sale.

4. Offer may be General or Specific

An offer need not always be made to an ascertained person but it is necessary that the ascertained person should accept it. For example, if a person offers a reward to anyone who finds his lost diamond ring, the finder can successfully claim the reward. The position be different if the finder has no knowledge of the reward.

Weeks v. Tybald, (1605) 75 ER 982: It was suggested in this case that the offer must be made to a definite person. That case arose out of the defendant's affirmation to the public that he would give ₹ 100 to him that should marry his daughter with his consent. The plaintiff alleged that he did so and sued the defendant. The court rejected this action and said that it is not averred nor declared to whom the words were spoken.

Discuss the facts of Lalman Shukla v. Gauri Dutt case.

Lalman Shukla v. Gauri Dutt, (1913) 11 All LJ 489: "The defendant's nephew having absconded from home, he sent this servant to find him out. Later on, he offered a reward of Rs. 501 to any one who discovered the boy. This offer came to the knowledge of the servant only after he had already discovered the boy. In a suit filed by the servant to claim the reward, it was held that he could successfully claim the reward only on the basis of contract and in this case there was no communication of proposal to him. He came to know of it after he had already discovered the boy which he was already under obligation to do by the nature of his calling.

It was held that since the plaintiff was ignorant of the offer of reward, his act of bringing the lost boy did not amount to the acceptance of the offer, and, therefore, he was not entitled to claim the reward.

Laid down the principle in Carlill v. Carbolic case.

Carlill v. Carbolic Smoke Ball Co., (1893) 1 QB 256: The defendants advertised their product, "Carbolic Smoke Ball", a preventive remedy against influenza. In the advertisement they offered to pay a sum of ₹ 100 as reward to anyone who contracted influenza, cold or any disease caused by taking cold after having used the, Smoke Ball three times a day for two weeks, in accordance with the printed directions. They also announced that a sum of ₹ 100 had been deposited with the Alliance Bank to show their sincerity in the matter. The plaintiff relying on the advertisement purchased a Smoke Ball from a chemist, used the same in accordance with the directions of the defendants, but still caught influenza. She sued the defendant to claim the reward.

It was held that this being a general offer addressed to all the world had ripened into a contract with the plaintiff by her act of performance of the required conditions and thus accepting the offer.

Section 8 Acceptance by performing conditions, or receiving consideration.-Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal.

Bhagwati Prasad Pawan Kumar v. Union of India, MANU/SC/2931/2006 : AIR 2006 SC 2331: Supreme Court clarified the legal position and expressed that the section 8 provides for acceptance by performing conditions of a proposal in this case. The Railway made an offer to the appellant laying down the condition that if the offer was not acceptable, the cheque should be returned with feeling which it would be deemed that the appellant accepted the offer in full and final satisfaction of its claim.

Harbhajan Lal v. Harcharan Lal, AIR 1925 All 539: Where a general offer is of continuing nature it will be open for acceptance

of any number of persons.

State of Tripura v. Bhowmik & Co., AIR 2004 Gau 21: If there being no agreement, there was no breach of contract committed by the respondent and also that since there was no breach of contract, the petitioner cannot retain or forfeit the earnest money deposited by the respondent by way of penalty.

Offer and Invitation to Offer

What is invitation to offer and how it differs from offer? Discuss the relevant case laws.

An offer must be distinguished from an 'invitation to receive offer' or as it is sometimes expressed in judicial language an 'invitation to treat'. In the case of an 'invitation to receive offer' the person sending out the invitation does not make an offer but only invites the other party to make an offer. His object is merely to circulate information that he is willing to deal with anybody who, on such information, is willing to open negotiation with him. Such invitation for offers are therefore not offers in the eye of law and do not become agreements by their acceptance.

Cheshire and Fifoot: "An offer capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound, provided that certain specific terms are accepted. The offerer must have completed his share in the formation of a contract by finally declaring his readiness to undertake an obligation upon certain conditions, leaving to the offeree the option of acceptance or refusal."

Explain the facts of Harvey v. Facie and the principle laid down.

Harvey v. Facie, (1893) AC 552: The plaintiff offered to purchase a plot of land Bumper Hall belonging to the defendant. He made the said offer through the telegraph and asked the defendant to telegraph the lowest price. The defendant sent the reply through the telegraph quoting the lowest price as Å" 900, The plaintiff was ready to purchase the land at the quoted price and sent his acceptance through telegram. But the defendant refused to sell the land for

Å" 900. The plaintiff therefore sued the defendant for the breach of contract.

The judicial committee of the Privy Council dismissed the action and observed-"the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the enquiry."

It was observed that the first telegram had asked two questions one regarding willingness to sell and the other regarding the lowest price. In reply only lowest price was quoted and this quoting of the price was not an offer. The third telegram from the plaintiffs saying. We agree to buy was only an offer and not the acceptance of an offer. Since this offer had not been accepted, there was no binding contract between the parties.

McPherson v. Appana, MANU/SC/0004/1951 : AIR 1951 SC 184: The plaintiff offered to purchase a lodge owned by the defendants for Rs 6000. He wrote the defendant's agent asking whether his offer had been accepted and saying that he was prepared to accept any higher price if found reasonable. The agent replied "wont accept less than rupees ten thousand". The plaintiff accepted this and brought a suit for specific performance. It was held that the defendant did not make any offer or counter-offer in his cable but was merely inviting offers. There was no assent to the plaintiff's offer to buy at Rs. 10,000 and, therefore, no concluded contract.

It was held that in this case the letter from the defendant's agent was not a counter offer but was a mere quotation amounting to invitation to offer. The plaintiff's willingness to pay Rs. 10,000 was an offer and since the same had not yet been accepted, there was no binding contract between the parties.

Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd., (1952) 2 QB 795: The exposure of goods by a shopkeeper does not amount to an offer to sell. On picking the goods, it is an offer by the customer to buy, and sale is not effected until the buyer's offer price is accepted by the shopkeeper.

State Bank of Patiala v. Ramesh Chandra Kanoji, MANU/SC/0157/2004 : AIR 2004 SC 2016: In pursuant to Voluntary Retirement Scheme (VRS) framed by the appellant bank, the respondent employee made an offer by making an

application seeking voluntary retirement. In the scheme of 15 days time was given to the employee to opt for the scheme. It was also provided that application once made could not be withdrawn. Hence withdrawal, after date of closure of scheme was not permissible.

The Supreme Court observed that as scheme was an invitation to offer and not an offer and such schemes being funded schemes employee if permitted to withdraw at any time after closure, then in such event, all calculation of management would fail.

Revocation of Proposal

How and when proposal is revoked? Explain with examples.

A proposer may according to the law revoke a proposal.

According to section 5: "A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards."

Illustration.-A proposer, by a letter sent by post to sell his house to B. B accept the proposal by a letter sent by post. A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but no afterwards.

Revocation, how it is made: Section 6.-A proposal is revoked-

- (1) by the communication of notice of revocation by the proposer to the other party,
- (2) by the lapse or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance,
- (3) by the failure of the acceptor to fulfil a condition precedent to acceptance, or
- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Rajendra Kumar Verma v. State of Madhya Pradesh, MANU/MP/0038/1972 : AIR 1972 MP 131: It has been held that a person who makes an offer is entitled to withdraw his offer or tender before its acceptance is intimated to him. The Government by merely providing a clause to the contrary in the tender notice could not take away the legal rights of a person.

CHAPTER III

ACCEPTANCE

A proposal when accepted, results in an agreement. It is only after the acceptance of the proposal that a contract between the two parties can arise. According to Anson, "Acceptance is to offer what a lighted match is to a train of gunpowder". An offer creates no legal rights or duties unless it has been accepted. It is an acceptance which converts an offer into a contract.

According to section 2(b): When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

According to Cheshire and Fifoot: An invitation to accept or even a mental resolve to accept a proposal does not give rise to a contract. There must be some overt or mental manifestation of the intent by speech, writing or other Act.

Discuss the facts and principle laid down in "Felthouse v. Bindley

Felthouse v. Bindley, (1863) 7 LT 835: The plaintiff wrote a letter to his nephew offering to buy his horse for Å" 30, 15s. He also wrote in his letter. "If I hear no more about him, I shall consider the horse mine at Å" 30, 15s." The nephew did not give any reply of his letter. However, he told the defendant, an auctioneer, not to sell the horse. Thus, he intended to reserve the horse for his uncle. But the defendant sold the horse by mistake. The plaintiff, thereupon, sued the defendant, the auctioneer for conversion of property.

The court dismissed this plea and held that since the nephew did not communicate his acceptance. No contract took place between the plaintiff and his nephew and consequently he had no right to complain of the sale. The Court also held that the communication of acceptance must be made to offerer himself or his agent. The communication of acceptance to stranger will not be a valid acceptance.

Powell v. Lee, (1908) 90 LT 234: The plaintiff was an applicant for the headmastership of a school. The managers passed a resolution appointing him, but the decision was not communicated to him. One of the members, however, in his individual capacity informed him. The managers cancelled their resolution and the plaintiff sued for breach of contract.

The court rejected the action and observed that there must be notice of acceptance from the contracting party in some way. Information by an unauthorised person is an insufficient as overhearing from behind the door.

Bhagwandas v. Girdharilal and Co., MANU/SC/0065/1965 : AIR 1966 SC 543: The principle is that there should be some external manifestation (Court Act) of acceptance. A mere mental determination to accept unaccompanied by any external indication will not be sufficient. An agreement does not result from a mere state of mind: Intent to accept an offer or even a mental resolve to accept an offer does not give rise to a contract. There must be external manifestation of that intent by speech, writing or other act.

Communication of Acceptance must be by a Person who has Authority to Accept

Discuss the mode of communication of acceptance and whether acceptance may be inferred from conduct of parties.

In order that the acceptance can be treated as valid it is necessary that the same must be communicated to the offeror either by the offeree or by some duly authorised person on his behalf. If the communication is made by an unauthorised person, it does not result in a contract.

Powell v. Lee, (1908) 99 LT 284: A communication of acceptance to be valid, must be either by the offeree himself or by his authorised agent. A communication of acceptance by any other person will not be valid. In this case court held that no contract was concluded because a communication of acceptance to be valid must be made by the offeree himself or his unauthorised agent.

Karan Singh v. The Collector, Chattarapur, MANU/MP/0016/1980 : AIR 1980 MP 89: In an auction of the quarry lease,

the petitioner bids of Rs. 1800 was the highest. In accordance with the auction conditions the petitioner deposited the security and earnest money of Rs. 540. The bid was not accepted at the auction. The bid was subsequently accepted by the collector, but instead of sending the communication of acceptance to the petitioner, the same was wrongly sent to somebody else. The officer concerned realized the mistake after the expiry of the period of lease. Then a demand notice was sent to the petitioner asking him to pay the lease money. The petitioner, on the other hand, demanded the refund of the security of Rs. 540.

It was held that the petitioner's bid which was an offer although accepted on file, did not result in a contract as no intimation was sent to the petitioner and received by him. The demand notice for recovering the lease money was quashed and the respondent were directed to refund the security deposit.

Acceptance may also be Inferred from the Conduct of Parties

It is well-settled that an offer may be accepted by conduct. But conduct would only amount to acceptance if it is clear that the offeree did the act with the intention actual or apparent of accepting the offer.

Brogden v. Metropolitan Railway Co., (1877) LR 2 App Cas 666: The respondents were being supplied coal and coke for their locomotives by the appellants for sometime without any formal agreement for the same. The respondents sent a draft agreement to the appellant leaving some blanks to be filled and signed by the appellant.

The court held that mere silence does not constitute acceptance but it may be implied from the conduct of the parties. In this case the fact that the respondents had placed order for supply of coal and accepted the same, constituted their acceptance and the fact that the appellant supplied the coal on the terms of the agreement clearly showed that the parties had entered into the contractual relationship on the basis of the agreement signed by the appellant. The appellant was, therefore, held liable.

Rakesh Kumar Dinesh Kumar v. U.G. Hotels & Resorts Ltd., AIR 2001 HP 135 (138): In a contract for supply of goods by plaintiffs to defendant, there was default by defendant in making payment. Subsequently, the defendant made an offer, in writing to a certain amount in full and final settlement of dues. The conduct of the parties showed that the plaintiff had impliedly accepted the offer and received part of amount. Thereafter the plea that the said offer in writing cannot be termed as fresh concluded contract for time-barred debt and as such suit for recovery was not within limitation would be untenable.

Implied Acceptance

The acceptance of an offer/promise can be in express terms and can also be in implied terms.

Ramji Dayawala & Sons (P) Ltd. v. Import, Invest, MANU/SC/0502/1980 : AIR 1981 SC 2085: The Supreme Court of India has also observed that in the fact of a given case acceptance of a suggestion may be sub silentio reinforced by the subsequent conduct. True it is the general rule is that an offer is not accepted by mere silence on the part of the offeree. There may, however, further facts, which taken together with offeree's silence constitutes an acceptance.

Bharat Petroleum Corporation Ltd. v. Great Eastern Shipping Co. Ltd., AIR 2008 SC 257: There was an agreement called the time charter party in legal parlance entered into between the appellant and the respondent on 6th May, 1997, for letting on hire vessels for a period of two years, on terms and conditions set-out in the said agreement. The charter party was extended for further period. However, there had been correspondence with regard to the finalization of the hire rates. No new agreement was signed between the parties, however, the appellant continued to use the vessel on hire with them. Under the time charter dated 6th May, 1997. It was held by the Apex Court that the conduct of the parties, as evidenced in the said correspondence and, in particular appellant's silence on respondent letters. Coupled with the fact that they continued to use the vessel, manifestly went to show that they accepted the stand of the respondent sub silentio and thus contained to bind themselves by the terms and conditions contained in the Charter Party dated 6th May, 1997.

When is Communication of Acceptance Complete

As soon as the communication of acceptance is complete, a contract comes into being, whereby both the parties

become bound in case the parties to the contract are present at the same place, one making the offer and the other communicating the acceptance, both the parties become bound immediately. The problem arises when the parties are at different places and the communication of offer and acceptance is made by post or telephone etc.

Explain the principle laid down in section 4 with relevant examples.

According to section 4: The communication of an acceptance is complete as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor, as against the acceptor, when it comes to the knowledge of the proposal.

Illustration

B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,

as against A when the letter is posted,

as against B when the letter is received by B.

Postal Communication.-When the parties are at a distance and are contracting through post or by messengers, the question arises when is the contract conducted? Does the contract arise when the acceptance is posted or when it is received.

Adam v. Lindsell, (1818) 106 ER 250: On September 2, 1817, the defendants sent a letter offering to sell quantity of wool to the plaintiffs. The letter added "receiving your answer in course of post". The letter reached the plaintiffs on September 5 on that evening the plaintiffs wrote an answer agreeing to accept the wool. This was received by the defendants on September 9. The defendants waited for acceptance upto September 8 and not having received it, sold the wool to other parties on that date. They were sued for breach of contract.

It was contended on their behalf that till the plaintiff's answer was actually received there could be no binding contract and therefore they were free to sell the wool on 8th. According to court, the complete contract arises on the date when the letter of acceptance is posted in due course.

Household Fire and Accidental Insurance Co. v. Grant, (1879) Ex D 216: In this case, the defendants made an application for the allotment of shares in the plaintiff's company. The plaintiff posted a letter of acceptance in due time but the defendant never received this letter. Yet it was held that the contract was complete when the letter of acceptance was posted and hence the defendant was bound by the acceptance.

The judge L.J. stated that an acceptance "which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offeror, is no binding agreement." The acceptor, in posting the letter has put it out of his contract and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound.

Dunlop v. Higgins, (1848) 1 HLC 381: Dunlop & Co. offered to sell 200 tons of iron pigs at 65 shilling per ton to Higgins & Co. through their letters dated 22nd and 28 January, 1945. Higgins & Co. received the letters on 30th Jan and replied the same day, indicating their acceptance to purchase the iron pigs in accordance with the offer. Due to frosty weather there was disruption in the train service and the letter of acceptance instead of reaching on 31st January reached Dunlop & Co. on 1st February Dunlop & Co. refused to supply iron pigs on the ground that the receipt of the letter of acceptance by them had been delayed. It was held that Dunlop & Co. had become bound by the contract as soon as the letter of acceptance was posted to them, i.e., on 30th January, 1945.

Bhagwandas v. Girdharilal & Co., MANU/SC/0065/1965 : AIR 1966 SC 543: This rule was based on commercial expediency or what is also called the 'empirical grounds'. It makes a large inroad upon the concept of consensus 'a meeting of minds' which is the basis of foundation of formation of contract.

Kulkuram Kesharwari v. State of Madhya Pradesh, MANU/MP/0047/1986 : AIR 1986 MP 204: The Madhya Pradesh High

Court observed that the general rule is that it is the acceptance of offer by the offeree and intimation of that acceptance to the offerer which result in a contract.

Progreessive Construction Ltd. v. Bharat Hydro Power Corp. Ltd., AIR 1996 Del 92: It has been held that when the parties enter into contract by correspondence by post, the contract would be deemed to be complete, where the offer was received and the acceptance was posted. The place of delivery of letter is irrelevant and, therefore, the cause of action does not arise where the contract of letter is delivered.

How the acceptance is complete by Telex or Telephone?

Acceptance by Telephone or Telex.-Sections 4 and 5, which make provisions about the communication of offer and acceptance and the revocation thereof, do not make a mention whether these provisions relate to communication made with the help of telephone and telex also, when the parties are in each other's presence or though separated in space yet are in direct communication as by telephone, the contract is not complete until the offerer comes to know the fact of acceptance.

Entares Ltd. v. Mills Far East Corporation, (1955) 2 QB 327: The plaintiff made an offer from London by telex to the agents in Holland of the defendant of the purchase of certain goods, and the offer was accepted by a communication received on the plaintiff's telex machine in London. On the allegation that breach of contract was committed by the defendant corporation, the plaintiff sought leave to serve notice of a writ on the defendant corporation claiming damages for the breach of contract. The defendant corporation contended that the contract was made in Holland.

Court of Appeal held that where a contract is made by instantaneous communication for example by telephone the contract is complete only when the acceptance is received by offerer, since generally an acceptance must be notified to the offerer to make a binding contract.

Denning L.J.: That the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offerer, and the contract is made at the place where the acceptance is received.

In the case of telephone conversation, in a sense the parties are in the presence of each other: each party is able to hear the voice of the other. There is instantaneous communication of speech intimating offer and acceptance, rejection or counter-offer. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversation so as to make it analogous to that of an offer and acceptance through post or by telegraph.

Quadricon Pvt Ltd. v. Bajrang Alloys Ltd., MANU/MH/1379/2007 : AIR 2008 Bom 88: The plaintiff has stated that the defendant accepted the purchase order by "its letter", indicating thereby that the documents had been sent by post. The plaintiff however pleaded that acceptance was communicated by the defendants by fax sent from Raipur to the plaintiff at Mumbai. The plaintiff having failed to prove the averment, the contract could not be said to have been concluded at Mumbai, the court held. If it was found that the letter of acceptance was communicated by fax, it would have led to the conclusion that the contract was completed and formed in Mumbai where the communication of the acceptance was received.

Sapna Ganglani v. R.S. Enterprises, AIR 2008 Kar 178: The Karnataka High Court has observed that whether a contract in respect of immovable property, entered into through e-mail was enforceable, was a mixed question of facts and law. The question the court said could be decided by the trial Court after full-fledged trial.

What are the essentials of a valid acceptance

Section 7: Acceptance must be absolute.-In order to convert a proposal into a promise the acceptance must,-

- (1) be absolute and unqualified,
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribe the manner in which it is to be accepted, if the proposal prescribe a manner in which it is to be accepted, and the acceptance is not

made in such manner, the proposer may within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise, but if he fails to do so, he accepts the acceptance.

Essentials of a Valid Acceptance

- (1) Acceptor should be communicated by the offeree to the offeror.
- (2) Acceptance should be absolute and unqualified.
- (3) Acceptance should be made in some usual and reasonable manner, unless the proposal prescribes the manner of acceptance.
- (4) Acceptance should be made while the offer is still subsisting.

1. Acceptance should be Communicated

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. It means that the offeree must signify his assent, or communicate the acceptance. The communication of acceptance is deemed to be made by any act or omission of the party accepting, by which he intends to communicate such acceptance or which has the effect of communicating it.

For a valid contract, the acceptance must be communicated and moreover, such communication should be made to the offeror. If I decide to accept your offer but do not communicate my acceptance to you or after having decided to accept your offer I tell my servant about my intention, that cannot give rise to a contract.

Illustration.-A law book seller, without any order from A sent by post a costly law book to him with the note that if he did not return the book, he would presume that the same has been accepted by him. A was of course ready to return the book but the book-seller was not agreeable to accept the same inasmuch as a new edition of the book had been published during this period. Is A in any way liable to the book-seller?

The court observed that the offeror cannot impose upon the offeree an obligation to accept nor proclaim that silence of the offeree shall be deemed acceptance. Therefore, A was not bound to return the book nor to communicate his refusal to accept. Since there was no concluded contract between A and the law book-seller, A was not in anyway liable to book-seller.

2. Acceptance should be Absolute and Unqualified

Acceptance means an acceptance without any deviation of any kind in the proposal or without any conditions. In other words, unconditional acceptance without seeking any modification in the proposal is regarded as absolute and unqualified acceptance. If conditions are imposed while communicating acceptance or any variation or modification are sought in the proposal, then such an acceptance cannot be regarded as valid acceptance as the same as not absolute and unqualified.

If I offer to sell my radio to you for Rs. 500 and you convey that you are willing to pay only Rs. 400 for the same, there is no contract in this case. Your willingness to pay Rs. 400 is not acceptance to my offer, it is counter-offer by you.

Claridges Infotech Pvt. Ltd. v. Surendra Kapur, MANU/MH/0318/2008 : AIR 2009 Bom 1: By your counter-offer you are willing to purchase the radio for Rs 400 instead of Rs. 500. A contract can arise if I unconditionally accept your offer (counter-offer). By conditional acceptance or the counter-offer, the original offer is deemed to be rejected. Once the original offer is destroyed by counter-offer, it is a dead offer and cannot be accepted unless renewed.

Technocom v. Railway Board, AIR 2009 Pat 15: Where acceptance is subject to any condition to be fulfilled by the acceptor on the spot, the acceptance cannot be treated as valid as the same not being absolute and unqualified.

Discuss the facts of Hyde v. Wrench.

Hyde v. Wrench, (1840) 3 Beave 334: There an offer was made by A to B for the sale of a form for 1000 pounds. B rejected this offer and said that he will pay only ₹ 950 to which A did not agree. Thereupon, B said that he was willing to pay 1000 pounds to which also A did not agree. B sued A and contended that there was a contract by which A was bound. It was held that B had once rejected A's offer by his counter-offer to pay 950 Pounds and this made the original offer to lapse, and therefore, no contract had resulted in this case.

Union of India v. Uttam Singh Duggal and Co. (Pvt) Ltd., AIR 1972 Del 110: Thus offer and acceptance must be identical to each other. The Delhi High Court observed- "When there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in the formation of a legal contract."

Suraj Besan & Rice Mills v. Food Corporation of India, AIR 1988 Del 224: A composite offer, the court said could not be accepted in part unless the party agreed to that course. It was not open to the defendant, the court ruled, to accept only part of the plaintiff's counter-proposal and unilaterally style it as an "unconditional" acceptance. The only course was to reject the plaintiff's conditional counter-proposal in its entirety.

Stevenson, Jaques & Co. v. Mclean, (1880) 5 QBD 346: The offeror made an offer to sell iron at 40 shilling net cash per ton. After receiving the offer the offeree sent a telegram to the offeror to know about the terms of delivery and payment. It was held that this enquiry did not mean the rejection of the original offer or a counter-offer and therefore the offeree could still accept the offer. It was observed that in this case it was a "mere enquiry, which should have been answered and not treated as a rejection of the offer.

3. Acceptance should be Expressed in Usual and Prescribed Manner

Acceptance must be in some usual and reasonable manner or in the manner communicated by the proposer. It is not usual to accept a business offer by a plaint in a suit for specific performance, nor it is usual to communicate acceptance by serving a copy of the plaint through the medium of the court.

According to section 7(2), the acceptance must be expressed in some usual and reasonable manner unless the proposal prescribed the manner in which it is to be accepted. It means that if the manner of acceptance has been prescribed by the proposal, the acceptance has to be in that prescribed manner, otherwise the same may be made in some usual or reasonable manner For example, if an offer is made by post and no mode is prescribed, the acceptance may also be made by post. But if A in Lucknow sends a proposal to B in Calcutta and B send a man with letter of acceptance of walk down from Calcutta to Lucknow to communicate it to A, it will not be usual and reasonable.

Life Insurance Corporation of India v. R. Vasireddy, AIR 1984 SC 1014: In the contract of Life Insurance, the Supreme Court held that mere encashment of a cheque of the first insurance premium or mere delay in conveying the acceptance of the proposal did not mean its acceptance. In case the formal internal procedure of approval of the proposal by the Divisional Manager has yet to be gone through, the contract does not arise until the same is done. Therefore, if the proposer died before the needful was done his widow could not claim the assured amount of Rs. 50,000.

Chairman-cum M.D. T.N. Tea Plantation Corporation Ltd. v. Srinivasa Timbers, MANU/TN/0052/1999 : AIR 1999 Mad 111: The respondents had made the highest bid for the grant of a forest contract by the appellant to them. The bid was accepted subject to the condition that the respondent would deposit the prescribed amount and execute the agreement. The respondent failed to fulfil this condition and the appellant cancelled the contract and returned the earnest money deposited by the respondent tenderer. The tenderer accepted the refund of earnest money without protest. The respondent then challenged the decision of the appellant to cancel the contract.

It was held that the contract was subject to conditions which were not fulfilled, and, therefore, the cancellation of the contract was valid. A conditional acceptance does not result in a concluded contract unless the said condition gets fulfilled.

4. Acceptance should be made while the Offer is Still Subsisting

To be legally effective acceptance must be given within the specified time limit, and if no time is stipulated, acceptance must be given within a reasonable time because an offer cannot be kept open indefinitely.

Shree Jaya Mahal Co-operative Housing Society v. Zenith Chemical Works Pvt. Ltd., MANU/MH/0038/1991 : AIR 1991 Bom 211: Where M applied for certain shares in a company in June but the allotment was made in November and he refused to accept the allotted shares, it was held that the offeror M could refuse to take shares as the offer stood withdrawn and could not be accepted because the reasonable period during which the offer could be accepted had elapsed.

Revocation of Acceptance

Section 4: The communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be put of the power of the person who makes it, as against the person to whom it is made, who it comes to his knowledge.

Illustration

A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is dispatched.

It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched, and as against A when it reaches him.

Section 5: Revocation of acceptance.-An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustration

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Section 6: Revocation, how it is made.-A proposal is revoked-

- (1) by the communication of notice of revocation by the proposer to the other party,
- (2) by the lapse of time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance,
- (3) by the failure of the acceptor to fulfil a condition precedent to acceptance,
- (4) by the death or insanity of the proposer, if the fact of his death, or insanity comes to the knowledge of the acceptor before acceptance.

CHAPTER IV

CONSIDERATION

According to Anson's Law of Contract "Consideration is necessary for the formation of every simple contract: an informal promise without consideration is not actionable in English law even though the promisee may have acted upon it to his detriment.

Denning L.J.: Consideration is a cardinal necessity of the formation of contract.

Consideration, of course, must be something which is of some value in the eye of the law. Motive must not be confused with consideration.

Blackstone: Consideration is the recompense given by the party contracting to the other. It is the price of the promise.

Pollock: Consideration is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."

Justice Patterson: Consideration means something which is of some value in the eyes of the law. It may be some benefit to the plaintiff or some detriment to the defendant.

Lord Green: A consideration some sort or other is so necessary to the forming of a contract, that a nudum pactum or agreement to do or pay something on one side without any compensation on the other will not at law support an action and a man cannot be compelled to perform it.

Currie v. Misa, (1875) LR 10 Exch 153 it is observed that a valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

In the *Fazaluddin v. Panchamdas*, AIR 1957 observed that the consideration is due price of a promise, a return or quid pro quo, something of value received by the promisee as inducement of the promise.

What is consideration? Explain with examples and case laws.

Section 2(d) Indian Contract Act, 1872.-When at the desire of the promisor, the promisee or any other person has done or abstains from doing, or does or abstains from doing, or promises to do or to abstains from doing something, such act or abstinence or promise is called a consideration for the promise.

Under Indian Law also, consideration is necessary for the formation of contract. Section 10 of Indian Contract provides, "All agreements are contracts if they are made by the free consent of parties and competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

Chidambara Iyer v. P.S. Renga Iyer, MANU/SC/0279/1965 : AIR 1966 SC 193: The Supreme Court quoted that consideration means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee."

Section 25 lays down the general rule that "an agreement without consideration is void".

Illustration

- (a) A promises, for no consideration to give to B Rs. 1000. This is a void agreement.
- (b) A, for natural love and affection promises to give his son B Rs. 1000. A puts his promise to B into writing and registers it. This is a contract.

Essentials of Consideration

- (i) at the desire of the promisor.
- (ii) the promisee or any other person

(iii) has done or abstained from doing something, or

(iv) does or abstain from doing something, or

(v) promises to do or to abstain from doing something, and

(vi) such act or abstinence or promise is called a consideration for the promise.

1. At the Desire of the Promisor

What are the essentials of consideration?

It is essential that the consideration must have been at the desire of the promisor, rather than merely voluntarily or at the instance of third party. The act or abstinence must be done at the desire of the promisor. An act done at the desire of a third person will not constitute a good consideration.

Discuss the facts of case 'Durgaprasad v. Baldeo.'

Durgaprasad v. Baldeo, ILR (1880) 3 All 221: The plaintiff built a market at the desire of the Collector of the District. The defendant who subsequently occupied one of the shops in the market agreed to pay a certain commission on all goods sold through him in the market. An action brought by the plaintiff on the breach of said promise was dismissed on the ground that the plaintiff built the market at the desire of the collector and not that of the defendant and hence the promise was without consideration and could not be enforced.

The only ground for the making of the promise is the expense incurred by the plaintiff is establishing the market but it is clear that anything done in that way was not 'at the desire' of the defendants so as to constitute consideration.

Kedarnath v. Gourie Mohammad, ILR (1886) 14 Cal 64: The plaintiff was Municipal Corporation and one of the trustee of the Howrah Town Hall Fund. When the subscriptions list reached a certain point, the Commissioners including the plaintiff entered into a contract for the purpose of building the Town Hall. The defendant on being applied to, had subscribed his name in the book for Rs. 100. The question to be decided was whether the plaintiff, as one of the persons who made himself liable on the faith of the promised subscriptions, could sue on behalf of himself and all those in the same interest with him to recover the amount of the subscription from the defendant. The court decided the question in the affirmative and held the defendant is liable to pay Rs. 100, the subscription promised by him.

2. The Promisee or any Other Person

What principle is laid down in Kedarnath v. Gourie Mohammad?

In India, there is a possibility that consideration for the promise may move not from the promisee but a third person, who is not a third party to the contract. For example. A promises to give his watch to B and a consideration of Rs. 2000 for the same is given to A by X and not by B. This will not constitute a valid contract in England as consideration for A's promise in favour of B was not provided by the promisee B himself but by somebody else.

What are the facts in Dulton v. Poole?

Dulton v. Poole, (1677) 2 Lev 210: Plaintiff's father decided to cut the family tree for the marriage of his daughter, the plaintiff. His son promised to pay

£ 1000 for plaintiff's marriage and asked his father not to cut the family tree. The plaintiff's father did accordingly. Subsequently, the father, the plaintiff, therefore sued the defendant to recover the money. It was held that although the plaintiff was not a party to the contract between the father and the son, yet she was entitled to recover the promised sum from the defendant.

It is clear that the defendant gave this promise to his father and it was the father alone who, by abstaining from selling the wood had furnished consideration for the promise. The plaintiff was neither privy to the contract nor interested in the consideration.

Tweddle v. Atkinson, 123 ER 762: 1 B&S 23: The Court of Queen's Bench refused to follow this principle.

The plaintiff was to be married to the daughter of one G and in consideration of this intended marriage G and the plaintiff's father entered into a written agreement by which it was agreed that each would pay the plaintiff a sum of the money. G failed to do so and the plaintiff sued his executors.

Whitman J. considered it to be an established principle "that no stranger to the consideration can take advantage of a contract, although made for his benefit.

Although the sale object of the contract was to secure a benefit to the plaintiff he was not allowed to sue as the contract was made with his father and not with him.

Define 'Privity of Contract.' Whether it is applicable in India?

Whitman J. observed: It is now well-established that no stranger to the consideration can make advantage of a contract although made for his benefit. Crompton J. also emphatically remarked: It would be a monstrous proposition to that a person was a party to the contract for the purpose of suing upon it for this own advantage, and not a party to it for the purpose of being sued.

The above principle is known as the "Privity of Contract", which mean that a contract between the parties only and no third person can sue upon it even if it is avowedly made for his benefit.

Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd., (1915) AC 847: Plaintiff sold certain goods to one Dew & Co. and secured an agreement from them not to sell the goods below the list price and that if they sold the goods to another trader they would obtain from him a similar undertaking to maintain the price list. Dew so sold the motor tyres to the defendants (Selfridge & Co.) who agreed not to sell the tyres to any private customer at less than the list prices the plaintiff sued the defendants for breach of this contract.

It was held that assuming that the plaintiffs were undisclosed principals, no consideration moved from them to the defendants and that the contract was unenforceable by them.

Venkatachinnaya v. Venkataramaya, ILR (1881) 4 Mad 137: In this case, the defendant's mother gave her daughter her share in the Zamindari by a registered deed of gift. In consideration of the share in the Zamindari received in pursuance of the above provision of the deed. The defendant on the same date executed an agreement in favour of the donor's brother promising to fulfil the terms of the deed. But she failed to fulfil the said promise. A suit was brought to recover the amount due with interest by the donor's brother. The defendant resisted the suit on the ground that no consideration moved from the side of the donor's brothers and the promise could not be enforced.

The Madras High Court held that the defendant was liable.

Venkatachinnaya v. Venkataramaya, ILR (1881) 4 Mad 137: In that case, A an old lady granted an estate to her daughter with a direction that that the daughter should pay an annuity of Rs. 653, to A's brothers. On the same day, the defendants made a promise with the plaintiffs that she would pay the annuity as directed by A. The defendant failed to pay the stipulated sum. In an action against her by the plaintiff she contended that since the plaintiff themselves had furnished as consideration, they had no right of action.

The Madras High Court held that in this agreement the consideration has been furnished by the defendant's mother and that is enough consideration to enforce the promise between the plaintiff and the defendant.

Doctrine of Privity of Contract of India

The doctrine of privity of contract means that only those persons who are parties to the contract can enforce the same. A stranger to the contract cannot enforce a contract even though the contract may have been entered into for his benefit. If in a contract between A and B some benefit has been conferred upon X, X cannot file a suit to enforce a contract because A and B are the only parties to a contract whereas X is stranger to the contract.

Jamuna Das v. Ram Avtar, (1911) 9 Ind App 7: A purchaser of property contracted with the seller to pay off the

mortgage debt. In an action brought by the mortgagee against the purchaser to recover a mortgage debt.

It was held by the Privy Council that he was not entitled to force the contract so as to compel the purchaser to pay off the debt because he was not a party to the contract.

Lord MacNaughtan stated: The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt.

Krishnalal v. Promila Bala, MANU/WB/0065/1928 : AIR 1928 Cal 518: The Chief Justice observed that there is nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract.

M.C. Chacko v. State Bank of Travancore, MANU/SC/0008/1969 : (1969) 2 SCC 343: Where a suit is for recovery of adviser changes against financier and the owner of circus, the plaintiff advisor is not a party to agreement between financier and owner of circus, though the proposal of financier was approved by financier but that was done on behalf of circus owner, it was held that there was no privity of contract between the plaintiff and financier and as such suit against financier is liable to be dismissed.

Advertising Bureau v. C.T. Devaraj, MANU/SC/0446/1995 : AIR 1995 SC 2251: It is noted that initial burden to prove the privity of contract lies on the plaintiff. But where the plaintiff supplies goods to the defendant and the defendant admits receipt thereof, the burden to prove that there was no privity of contract shifts on the defendant.

Exceptions to the Doctrine of Privity of Contract

What are the exceptions to the doctrine of 'Privity of Contract'? Explain with the help of case law.

In the course of time, the court have introduced a number of exception in which the rule of privity of contract does not prevent a person from enforcing a contract which has been made for his benefit but without his being a party to it the above rule is subject to the following exceptions.

(1) Trust or Charge.-Where an express or implied trust is created, the beneficiary can sue in his own right to enforce his rights under the trust, though he was not a party to the contract between the seller and the trustee.

A transfers certain properties to B to be held by B in trust for the benefit of M. M can enforce the agreement i.e., trust.

Khwaja Mohammed Khan v. Hussaini Begum, (1910) 37 IA 152: There was an agreement between the father of a boy and a girl that if the girl married a particular boy, the boy's father would pay certain personal allowance known as Kharcha-i-pandan (bettle box expenses) or pin money to the plaintiff. It was also mentioned that a certain property had been set aside by the defendant and this allowance would be paid out of the income of that property. The plaintiff married the defendant's son but the defendant failed to pay the allowance agreed to by him.

In an action by the plaintiff to claim this allowance the defendant contended that his conduct to pay the allowance had been made only with the plaintiff's father and not with the plaintiff, she being a stranger to the contract cannot sue.

Ranaumanath Bakhsh Singh v. Jang Bahadur, MANU/PR/0046/1938 : AIR 1938 PC 245: U was appointed by his father as his successor and was put in possession of his entire estate. In consideration thereof U agreed with his father to pay a certain sum of money and to give a village to J, the illegitimate son of his father, on his attaining majority.

It was held that in the circumstances mentioned above a trust was created in favour of J for the specified amount and the village. Hence he was entitled to maintain the suit.

(2) Marriage Settlement Partition or other family Arrangements.-Where a provision is made in a partition or family arrangement for maintenance or marriage expenses of female members, such members, though not parties to the agreement, can sue on the footing of the arrangement.

A daughter along with her husband entered into a contract with her father whereby it was agreed that she will maintain her mother and the property of the father will be conveyed to them. The daughter subsequently refused to maintain the mother on a suit, it was held that the mother was entitled to require her daughter to maintain her, though she was a stranger to the

contract.

Sundaraja v. Lakshiammal, (1914) 38 Mad 788: If on the partition of the joint family property along the male members a provision is made for the marriage expenses of a female member then such a female member can sue to enforce the agreement.

(3) Acknowledgment or Estoppel.-Where under a contract, a party undertakes an obligation to make a payment to a third party and he acknowledges it to the said third party, the third party, though not a party to the contract can enforce the contract. Thus if A receives some money from B to be paid over to C and he admits of this receipt to C, then C can recover this amount from A who shall be regarded as the agent of C.

Devaraja v. Ram Krishnaiah, AIR 1952 Mys 109: A sold his house to B under a registered sale deed and left a part of the sale price in his hands desiring him to pay this amount to C, his creditor. Subsequently B made part-payments to C informing him that they were out of the sale price left with him and that the balance would be remitted immediately. B, however, failed to remit the balance and C sued him for the same.

The suit was held to be maintainable. "Though originally there was no privity of contract between B and C, B having subsequently acknowledged his liability, C was entitled to sue him for recovery of the amount.

(4) Covenants running with land.-A person buying land is bound by covenants or agreements affecting the land although he may not be a party to the said covenants or agreements.

Tulk v. Moxhay, (1848) 41 ER 1143: A person who purchases a land with notice that the owner of the land is bound by certain duties created by an agreement or covenant affecting the land, shall be bound by them although he was not a party to the agreement.

3. Has Done or Abstained from Doing Something

According to English Law. "A consideration may be executory, a promise given for promise or it may be executed, an act or forbearance given for the promise, but it must not be past, for in that case, it is mere sentiment of gratitude or honour prompting return for benefit received.

Past consideration means that the consideration for any promise was given earlier and the promise is made thereafter. It is, of course necessary that at the time act constituting consideration was done, must have been at the desire of the promisor.

Under Indian Law, a past consideration is a good consideration under the Indian Contract Act.

Lampleigh v. Brathwait, (1956) Hob 105: In this case, the defendant was guilty of having committed a murder. He requested the plaintiff to obtain for him pardon from the king. The plaintiff made his best possible endeavours in this connection and incurred certain expenses. In consideration of this, the defendant promised to pay him ₹ 100. The plaintiff sued him to recover the promised sum.

4. Does or Abstains from Doing Something

The executed or present consideration is that when of the parties to the contract has performed his part of the promise, which constitutes the consideration for the promise by the other side, it is known as executed consideration. Performance of the promise by the other side is the only thing now to be done. For example, A makes an offer or reward of Rs. 100 to anyone who finds his lost dog and brings the same to him. B finds the lost dog and delivers the same to A when B does so that amounts to both the acceptance of the offer, which result in a binding contract under which A is bound to pay Rs. 100 to B, and also simultaneously giving consideration for the contract.

5. Promises to do or to Abstain from Doing Something

The executory or future consideration means when one person makes a promise in exchange for the promise by the other side, the performance of the obligation by each side to be made subsequent to the making of the contract, the consideration is known as executory. For example, A agrees to supply certain goods to B and B agrees to pay for them

on a future date, this is a case of executory consideration.

6. Such Act or Abstinence or Promise is Called Consideration for the Promise

According to Cheshire and Fifoot: "It has been settled for well over three hundred years that the court will not inquire into the inadequacy of consideration. By this is meant that will not seek to measure the comparative value of the defendant's promise and of the act or promise given by the plaintiff in exchange for it, nor will they denounce an agreement merely because it seems to be unfair.

Adequacy of Consideration

It is not necessary that consideration should be adequate to the promise. It is noted that although the consideration need not be adequate yet if there is an allegation that the consent of the promisor was not freely given the inadequacy of the consideration may be taken into account by the court determining the question whether the consent of the promisor was freely given.

Section 25, Explanation 2.-An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate, but the inadequacy of consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given.

Illustration

A agrees to sell a horse worth Rs. 1000 for Rs. 10. A's consent to the agreement was freely given. The agreement in contract, notwithstanding the inadequacy of the consideration.

Vijaya Minerals Pvt. Ltd. v. Bikash Deb, MANU/WB/0008/1996 : AIR 1996 Cal 67: "It may be noted that short of undue influence and duress, an agreement between the parties cannot be rendered nugatory on the ground that the consideration is not adequate."

Consideration must be Real

The Indian Contract Act does not expressly say that the consideration must be of some value in the eye of law but the courts have generally followed the English law on this point. That is to say in India also, the consideration must be valuable in the eye of law and not illusory.

White v. Bluett, (1853) 23 LJ Ex 36: A son used to complain to his father that his brothers had been given more property than him. The father promised that he would release the son from a debt if the latter stopped complaining. After the father's death an action was brought by the executor to recover the debt. The son contended that the father had made a contract to release him from the debt in consideration for his promise to not to complain to his father.

It was held that the promise by the son not to bore his father with complaints in future did not constitute good consideration for the father's promise to release him, and, therefore, the son continued to be liable for the debt.

Exception to Consideration

An agreement without consideration is void. Explain with suitable examples.

Section 25 of Indian Contract Act, 1872 lays down a general rule that an agreement without consideration is void, it also provides the exception to the general rule.

Section 25: Agreement without consideration is void.-

An agreement without consideration is void, unless:

- (1) It is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a, near relation to each other; or unless

(2) It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless.

(3) It is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.-Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.-An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises, for no consideration, to give B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

1. Natural Love and Affection

Define the essentials laid down in section 25(1)

The following essentials must be present:-

- (a) The agreement must be in writing,
- (b) It must be registered under the law for the time being in force for the registration of documents,
- (c) It must be out of natural love and affection, and
- (d) The parties must be standing in a near relation to each other.

Rajlukhy Debee v. Bhootnath Mookerjee, (1900) 4 Cal WN 488: The defendant promised to pay his wife a fixed sum of money every month for her separate residence and maintenance. The agreement was contained in a registered document which mentioned certain quarrels and disagreements between the two.

The Calcutta High Court refused to regard the agreement as covered by the exception. The court find that no trace of love and affection between the parties whose quarrels had compelled them to separate.

Bhiwa v. Shivaram, (1899) 1 Bom LR 495: A sued B, his brother, for a share in certain lands. But the suit was dismissed

as B solemnly affirmed that the property was not ancestral. B then agreed by registered writing to give A one-half of the same property. The present suit was brought to obtain that share.

Bombay High Court decided in favour of the plaintiff on the ground that the agreement in question had been out of love and affection between the parties who were in near relation to each other.

2. Promise to Compensate for Something Done Voluntarily

When something has done at the desire of the promisor, that constitutes a good consideration in respect of a subsequent promise to compensate for what has already been done. If A has supported B's son and subsequently B promises to pay A's expenses in so doing A is entitled to sue and get the said promise enforced.

Durga Prasad v. Baldeo, ILR (1880) 3 All 221: The Court observed that to bring it within the provision of the clause 25(2) it must be shown that what was voluntarily done by the plaintiff was done for the promisor or something which the promisor was legally compellable to do..... this has not been shown.

Essentials:

- (i) The act must have already been done,
- (ii) It must have been done voluntarily,
- (iii) It must be done for the promisor or something which the promisor was legally bound to do,
- (iv) The promisor must be in existence at the time when the act is done, and
- (v) The promisor must promise to compensate for the act already done.

A does work for B without the request or knowledge of B. A demands payment for the work done.

B is not bound to pay because the work by A was not done at his desire. Therefore it does not constitute consideration under section 2(d). Since B does not promise to compensate work done by A, it is not covered under section 25(2) noted above. Thus B is not bound to pay.

When A finds B's purse and give it to him and then B promises to pay A Rs. 50, or A supports B's infant son and B promises to pay A's expenses in so doing, there is a valid contract in such cases although A's act was a voluntary one.

3. Promise to Pay a Time-barred Debts

A promise to pay a time-barred debt is enforceable. The promise should be in writing. It should also be signed by the promisor or by his agent generally or specifically authorized in that behalf. The promise may be to pay, the whole or any part of the debt.

Essentials:

- (i) The promise to pay must be in writing and signed by the person concerned or his agent generally or specifically authorized in that behalf,
- (ii) The promise may be either for the whole of the debt or a part thereof,
- (iii) The promise to pay must be in respect of the debt which the creditor might have enforced payment but the law for the limitation of suits.

Arumugan v. Duraisinga, ILR (1914) 37 Mad 38: It has been held that a promissory note to pay the sum received during minority is not enforceable. The promise to pay the time-barred debt must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances.

4. Promise may Dispense with or Remit Performance

Section 63: Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him

or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promise to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B Rs. 5000. A pays to B and B accepts in satisfaction of the whole debt Rs. 2000 paid at the time and place at which the Rs. 5000 were payable. The whole debt is discharged.

5. Consideration not Necessary

Section 185: No consideration is necessary to create an agency.

CHAPTER V

CAPACITY TO CONTRACT

According to section 10: All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Section 11.-Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

Who is minor? Whether a minor is competent to make a contract? Discuss briefly.

According to section 11: the following persons are incompetent to contract:

- (a) minors;
- (b) person of unsound mind; and
- (c) persons disqualified from contracting by any law to which they are subject.

Who is a Minor

A person who has not attained the age of majority is a minor. Section 3 of the Indian Majority Act, 1875, about the age of majority. It states that a person is deemed to have attained the age of majority when he completes the age of 18 years, except in case of a person of whose person or property a guardian has been appointed by the court, in which case the age of majority is 21 years. In England, the age of majority is 18 years.

Nature of Minors Contract

According to section 11, a minor is incompetent to contract but the Indian Contract Act is conscious by its silence about the nature of minor's contract. That is to say, it is not clear as to whether it is void or simply voidable. This controversy was only resolved in 1903 by the judicial committee of the Privy Council in their well-known pronouncement in-

Discuss the principle laid down in Mohori Bibi v. Dharmodas Ghose.

Mohori Bibi v. Dharmodas Ghose, (1903) 30 IA 114: The plaintiff, Dharmodas Ghose, while he was a minor, mortgaged his property in favour of the defendant, Brahmodutt, who was a money-lender to secure a loan. At the time of the transaction the attorney, who acted on behalf of the money-lender, had the knowledge that the plaintiff was a minor.

The minor brought an action against the money-lender stating that he was a minor when the mortgage was executed by him and therefore, the mortgage was void and inoperative and same should be cancelled. By the time of Appeal to the Privy Council the defendant, Brahmo Dutt and Appeal was prosecuted by his executors.

Sir Lord North observed-"Act makes it essential that all the contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act and cannot arise in the case of an infant." A minor's contract is, therefore ab initio and wholly void. In the view of Privy Council, this was also in accordance with the Hindu notion of a minor's incompetent to contract.

The ruling of the Privy Council in the Mohori Bibi case has been generally followed by the courts in India and applied both to the advantage and disadvantage of minors.

Mir Sarwajan v. Fakhruddin Mohd. Chowdhury, (1912) 39 Cal 232 (PC): A contract to purchase certain immovable property had been made by a guardian on behalf of a minor and the minor sued the other party for a decree of specific performance to recover possession. His action was rejected.

Explain the status of contract if it is made by guardian in the interest of minor.

The court said that it was not within the competence either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immovable property; that as the minor was not bound by the contract, there was no mutuality, and that consequently the minor could not obtain specific performance of the contract.

Srikakulam Subramanyam v. Kurra Sabha Rao, (1949) 75 IA 115: In order to pay off the debts of his father, which were promissory notes owing to the appellants and a mortgage to another, a minor son and his mother sold a piece of land to the appellants in satisfaction of the notes, requiring that the appellants pay off the debts of his father, which were promissory notes owing to the appellants and a mortgage to another, a minor son and her mother sold a piece of land to the appellants in satisfaction of the notes requiring that the appellants pay off the mortgage debt. The appellants, accordingly, paid off the mortgagee and took possession. Afterwards the minor brought an action to recover back the land. It was found as a fact that the transaction was for the benefit of the minor and the guardian had the capacity to contract on his behalf.

The Privy Council held that if the guardian transfers property inherited by minor in lieu of the payment of debt the transfer shall be binding. Thus if the contract is in the interest of the minor, court may declare such a contract as valid.

Chacko v. Mahadevan, MANU/SC/3566/2007 : AIR 2007 SC 2967: Under section 11 of the Contract Act in order to be capable of entering into a contract, a person must be of sound mind. If the deed of sale is signed at the time when a person is under influence of wine and sells valuable land for less price, such a contract will be void and will be liable to set aside because then he was not of sound mind.

Effects of Minor's Agreement

A minor's agreement being void, ordinarily it should be wholly devoid of all effects. If there is no contract, there should indeed, be no contractual obligation on the either side. Consequently, all the effects of a minor's agreement must be worked out independently of any contract.

1. Estoppel against a Minor

When a minor represents at the time of contract that he has attained the age of majority, the question which arises in such a case is does the law of estoppel apply against him, so as to prevent him from alleging that he was a minor, when the contract was made?

Section 115: Indian Evidence Act.—"When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representatives shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

Mohori Bibi v. Dharmodas Ghose, (1903) 30 IA 114: The Court held that the section 115 does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is down to both parties.

Discuss the rule defined in the case of Khan Gul v. Lakha Singh.

Khan Gul v. Lakha Singh, AIR 1928 Lah 609: The law of estoppel is a general law applicable to old persons, while the law of contract relating to capacity to enter into a contract is directed towards a special object and it is a well established principle that, where a general intention is expressed by the legislature and also a particular prevails over the general one.

Lakhwinder Singh v. Paramjit Kaur, AIR 2004 P&H 6: The Court held that the contention that the transferee was a bona fide purchaser would not be available since he did not make all reasonable and diligent enquiries regarding the capacity of the transferor and the necessity to alienate the estate of the minor.

2. Action in Contract cannot be Converted into an Action in Tort

If the tort is directly connected with the contract and in the means of effecting it and is a parcel of the same transaction, the minor is not liable in tort. You can't convert a contract into a tort to enable you to sue an infant. A minor's agreement is of course, in principle devoid of all legal effects. A minor is in law inapplicable of giving consent, and there being no consent there could be no change in the character.

3. Doctrine of Restitution

Johnson v. Pye, (1665) 1 Sid 258: An infant by fraudulently misrepresenting his age induced to plaintiff to lend him ₹ 300. The plaintiff brought an action against for the tort of deceit. The action was rejected by the court on the ground that it was an indirect way of enforcing the contract which is void. Thus, an action of contract cannot be converted into an action in tort so as to make the infant responsible. The court added that if an action in contract is allowed to be converted into an action in tort, all the minors in England may be ruined.

Define doctrine of restitution with the help of case laws.

If a minor obtains some property by fraudulently misrepresenting his age, he can be ordered to restore the property or goods thus obtained. This is called the equitable doctrine. Under English law a minor may be compelled to restore the goods or property so long as they are traceable. Money being generally not traceable, a minor cannot be asked to restore it.

Leslie v. Sheill, (1914) 3 KB 607: An infant succeeded in deceiving some money-lenders by telling them a lie about his age and so got them to lend him ₹ 400 on the faith of his being an adult.

It was held by the court of appeal that the money could not be recovered if that were allowed, that would amount to enforcing the agreement to repay loan which is void under the Infant's Relief Act, 1874.

Lord Summer observed that unless there is a fiduciary relationship or accountability between the parties, the minor is entitled to repudiate the transaction on attaining majority. There is, however, an exception where the minor is in possession of the property which he can return in specie. But if it is repayment, the minor is not bound to pay it for it would amount to enforce a void contract.

Ajodhia Prasad v. Chandan Lal, MANU/UP/0066/1937 : AIR 1937 All 610 (FB): The mortgage-deed was executed by defendants in favour of the plaintiff. The defendants pleaded that they were minors at the time of the execution of the mortgage-deed and a guardian had been appointed for them. The plaintiff also asserted that the defendants were liable to pay the amount under section 68 of the Contract Act.

The court remarked that there was fraudulent misrepresentation made by on behalf of the respondents.

In accordance with the recommendation of the Law Commission, the principle of compensation has now been incorporated in section 33, Specific Relief Act, 1963. This provision now requires the payment of money compensation by a minor irrespective of the fact whether the minor as the plaintiff or the defendant in the case. The provision is as under-

Section 33-Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.-

(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resist any suit on the ground-

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, as far as may be, such benefit to that party as to make compensation for it.

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been

competent to contract under

section 11 of the Indian Contract Act, 1872 (9 of 1872) the court may if the defendant has received any benefit under the agreement from the other party, require him to restore so far as may be, such benefit to that party, to the extent to which he or his estate had benefited thereby.

Beneficial Contracts

Infant's liability is only in respect of those contracts which are beneficial to him. If the contract is substantially beneficial to an infant even though there are some minor disadvantageous to him, the contract is binding.

Raghava Charior v. Srinivasa, (1916) 40 Mad 308: Whether a mortgage executed in favour of a minor who was advanced the whole of the mortgage property is enforceable by him or by any other person on his behalf.

Contract of Marriage

Contract of marriage are supposed to be beneficial to minors and therefore a minor is entitled to enforce them. A contract for the marriage of a minor is also prima facie for his or her benefit is customary amongst most of the communities in India for parents to arrange marriages between their minor children and the law has to adopt itself to the habits and customs of the people.

Khimji Kuverji v. Lalji Karamsi, AIR 1941 Bom 315: Contracts of marriage are supposed to be beneficial to minors and a minor is entitled to enforce these contracts. The question before the Bombay High Court was whether the contract of marriage of a minor girl entered into by her mother on her behalf with a major boy could be enforced and she could sue for the breach of contract. In this case, her action was allowed.

Contracts of Apprenticeship

Contracts of apprenticeship is another species of contracts which are for the benefit of minors. The Indian Apprentices Act, 1850 provides for contracts in the nature of contracts of service which are binding on minors.

Explain the facts and principle in Roberts v. Gray case.

Roberts v. Gray, (1913) 1 KB 520: The defendant, an infant agreed with the plaintiff, a noted billiards player to join him in a billiards playing tour of the world. The plaintiff spent time and money in making arrangements for billiards matches, but the defendant repudiate the contract. The plaintiff succeeded in recovering damages for the breach of the contract.

The contract was held to be one for necessities as it was for the infant's "good teaching or instruction whereby he may profit afterwards".

Ratification

Whether a minor's contract is subject to ratification?

A minor's agreement being void ab initio, it is incapable of being validated by a subsequent ratification after the minor has attained the age of majority. The consideration furnished in respect of a transaction during minority cannot be considered to be a valid consideration for a subsequent promise after attaining majority and thus no ratification is possible of a promise made by a person during his minority. A contract by a minor is void. A void contract which is a dead letter cannot be revived and cannot constitute a valid consideration for a subsequent contract and, therefore, a transaction entered into by a minor during minority, cannot be ratified.

Necessaries Supplied to Minor: Section 68

What things come under the purview of "necessaries"?

If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled

to be reimbursed from the property of such incapable person.

Illustrations

(1) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(2) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

Pollock and Mulla: Necessaries must be things which the minor actually needs, it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use, they will not be necessary if he is already supplied with things of that kind and it is immaterial whether the party knows or not.

Nash v. Inman, (1908) 2 KB 1: A minor who was already having sufficient supply of clothing suitable to his position, was supplied further clothing by a trader. It was held that the price of the clothes so supplied could not be recovered.

What is Sound Mind for the Purpose of Contracting: Section 12

When an unsound mind person is capable to enter into the contract?

A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interest.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is, at intervals, of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

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CHAPTER VI

FREE CONSENT

Mutual free consent is an essential element of an agreement. Unless consensus and ad idem between parties is established, no enforceable contract takes place. There cannot be any agreement unless both the parties agree to it. If there is no consent, agreement will be void ab initio for want of consent.

When is a consent said to be free?

Section 13: Which defines consent provides that. "Two or more persons are said to consent when they agree upon the same thing in the same sense."

One of the essential of a valid contract mentioned in section 10 is that the parties should enter into the contract with their free consent. According to section 14, "Consent is said to be free when it is not caused by-

- (1) Coercion, as defined in section 15, or
- (2) Undue influence, as defined in section 16, or
- (3) Fraud, as defined in section 17, or
- (4) Misrepresentation as defined in section 18, or
- (5) Mistake, Subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud misrepresentation or mistake."

Section 2(i): "An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract."

Section 2(g): "Where consent is caused by mistake, the agreement is void. A void agreement is not enforceable at the option of either party."

Define coercion and essential elements of coercion.

Section 15: Coercion.-Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.-It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed."

Illustrations

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (45 of 1860).

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code (45 of 1860) was not in force at the time when or place where the act was done.

Essential Ingredients of Coercion.-Following are the essential ingredients of coercion:

- (i) committing or threatening to commit any act forbidden by the Indian Penal Code, or
- (ii) the unlawful detaining or threatening to detain any property to the prejudice of any person whatever,
- (iii) with the intention of causing any person to enter into an agreement.

1. Act Forbidden by IPC

Which acts are forbidden by IPC? Explain with the help of relevant case.

It has been noted that if a person commits or threatens to commit an act forbidden by the Indian Penal Code with a view to obtaining the consent of the other person to an agreement, the consent in such a case is deemed to have been obtained by coercion. For A threatens to shoot B if B does not agree to sell his property to A at the stated price, B's consent in this case has been obtained by coercion.

Ranganayakamma v. Alwar Setti, ILR (1889) 13 Mad 214: On the death of her husband, the husband's dead body was not allowed to be removed from her house for cremation, by the relatives of the adopted boy until she adopted the boy.

It was held that the adoption was not binding on the widow as her consent had been obtained by coercion.

Askari Mirza v. Bibi Jai Kishai, (1912) 16 IC 344: Consent obtained at the point of pistol, or by threatening to cause hurt, or by intimidation or by threatening to burn a man's house or slashing his valuable pictures.

Chickam Ammiraju v. Chickam Seshmma, ILR (1918) 41 Mad 33: A, a Hindu, by a threat of suicide, induced his wife and son to execute a release deed in favour of A's brother in respect of a certain properties claimed as their own by the wife and the son.

It was held that a threat to commit suicide amounted to coercion within the meaning of section 15 of Indian Contract Act and therefore the release deed was voidable.

2. Unlawful Detaining of Property

According to section 15, coercion could also be caused by the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Workmen of Appin Tea Estate v. Industrial Tribunal, AIR 1966 Assam 115: The demand of the workers for bonus was accepted after a threat of strike. The question which had arisen was whether such a decision between the union of the workers and the Indian Tea Association could be declared void on the ground that there was coercion.

Define undue influence and explain the essential elements with suitable examples.

Section 16: Undue Influence.-

(1) A contract is said to be induced by 'undue influence' where the relation subsisting between the parties are such that one of the parties is in a position to dominate the Will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the Will of another,-

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the Will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall be upon the person in a position to dominate the Will of the other.

Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

Illustrations

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is a stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is transaction in the ordinary course of business, and the contract is not induced by undue influence.

Mannu Singh v. Umadat Pandey, (1890) ILR 12 All 523: A spiritual advisor induced the plaintiff, his devotee to gift to him the whole of his property to secure benefits to his soul in the next world. The plaintiff gave whole of the property to the advisor.

The consent is obtained by undue influence. The court said: would any reasonable man in the full possession of his essence and not under unusual influence of some kind or the other do such a thing.

Lakshmi Amma v. T. Narayan, MANU/SC/0355/1970 : AIR 1970 SC 1367: A person was suffering from a number of ailments which confined him to a nursing home. There he made a deed gifting all his properties to one of his sons to the exclusion of others.

The gift deed was caused by undue influence voidable.

Subhash Chandra Das v. Ganga Prasad, MANU/SC/0069/1966 : AIR 1967 SC 878: Some agricultural property was gifted by a person to his only grandson to the total exclusion of his sons. Although, the donor was of great age, he was taking active interest in his property. Four years after the gift he died and still 4 years after that the other sons questioned the validity of the gift on the ground of undue influence.

The gift deed was valid.

Unconscionable Transaction

Wajid Khan v. Raja Ewaz Ali Khan, 1891 LR 18 Ind App 144: An old and illiterate woman, incapable of any business conferred on her confidential managing agent, without any valuable consideration an important pecuniary benefit under the guise of a trust.

All the facts show that there was active undue influence. The onus is on the grantee to show conclusively that the transaction is honest, bona fide well understood, the subject independence advice and free from undue influence.

Sheikh Ismail v. Amir Bibi, (1902) 4 Bom LR 146: It was found that a lady appeared because the Registrar for Registration of certain documents, that she stood as a witness in the box in a suit, that she put in tenants and fixed and recovered rents from them in respect of her house.

Section 19A: Power to set aside contract induced by undue influence.-When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem first.

Illustrations

(a) A's son has forged B's name to a promissory note. B under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the court may set the bond aside.

(b) A, money-lender, advances Rs. 100 to B, an agriculturist, and by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

What elements are included in the definition of fraud?

Section 17: Fraud.-Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent with intent to deceive another party thereto or his agent, or to induce him to enter into the contract.

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence, is, in itself, equivalent to speech.

Illustrations

- (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.
- (b) B is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B if the horse is of unsound mind.
- (c) B says to A-"If you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech.
- (d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

State of Andhra Pradesh v. T. Suryachandra Rao, MANU/SC/0431/2005 : AIR 2005 SC 3110: By fraud is meant an intention to deceive whether it is from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial. The fraud involves two elements deceit and injury to the person deceived.

Injury is something other than economic loss, that is deprivation of property, whether immovable or movable or of money and it will include any harm whatever caused to any person in body, mind, reputation or such others.

Explain the principle laid down in the case of Derry v. Peek.

Derry v. Peek, (1889) 14 AC 337: Lord Herschell said fraud is proved when it is shown that a false representation has been made-

- (i) knowingly,
- (ii) without belief in its truth,
- (iii) recklessly careless whether it be true or false.

Bhaurao Dagdu Paralkar v. State of Maharashtra, MANU/SC/0495/2005 : AIR 2005 SC 3330: The court expressed that court is an act of deliberate deception with the design of running something by taking unfair advantage of another. It is a deception in order to gain by another's loss.

1. False Statement of True Facts

In order to constitute fraud, it is necessary that there should be a statement of fact which is not true. Mere expression of opinion is not enough to constitute fraud.

Derry v. Peek, (1889) 14 AC 337: A company's prospectus contained a representation that the company had been authorized to run trams by steam or mechanical power. The authority to use steam was subject to the approval of the Board of Trade but no mention was made of this. The Board refused consent and consequently the company was wound-up. The plaintiff having bought some shares, sued the directors for fraud.

The directors were not held guilty of fraud as they honestly believed that once the Parliament had authorised the use of steam, the consent of the Board will be given in normal course.

2. Active Concealment of Facts [Section 17(2)]

When there is an active concealment of a fact by one having knowledge or belief of the fact, that can also be considered to be equivalent to a statement of fact and amount to fraud.

Shri Krishan v. Kurukshetra University, MANU/SC/0061/1975 : AIR 1976 SC 376: The petitioner was the student of law 1st year. His attendance was short. He did not mention that fact in the admission form. Neither the Head of Department nor the university authority made proper scrutiny to discover the truth. The university authorities cancelled the candidature of the petitioner on the ground of fraud.

A mere silence is no fraud. Therefore, cancellation on the ground of fraud was not sustainable.

Kiran Bala v. B.P. Srivastava, 1985: When there is no duty to speak, mere silence will be no fraud even if it amounts to misrepresentation.

With v. O'Flanagan, (1936) Ch 575: A medical practitioner represented to the plaintiff that his practice was worth ₹ 2000 a year. The representation was true. But 5 months later when the plaintiff actually bought the practice, it had considerably gone down on account of her illness.

The doctor was required to be honest to his own profession. A professional and a trader are two different things. The doctor was under a duty to speak. Fraud was constituted there.

3. Promise without Intention to Perform it [Section 17(3)]

When the person makes a promise, there is deemed to be an undertaking by him to perform it, if there is no such intention when the contract is being made, it amounts to fraud.

4. Any Other Act Fitted to Deceive [Section 17(4)]

Any Act which is fitted to deceive of this, it had been observed by Pollock and Mulla-The mention of "any other act fitted to deceive" appears to be inserted merely for the sake of the abundant caution.

5. Any Act or Omission which the Law Declares or Fraudulent [Section 17(5)]

This clause includes any such act or omission as the law specifically declares to be fraudulent. It also include section 55 of Transfer of Property

Act, 1882 declares certain kinds of omission on the part of the seller or the buyer as fraudulent.

Define misrepresentation with essential elements. Give examples and relevant case laws.

Section 18: Misrepresentation.- "Misrepresentation" means and includes:

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or

anyone claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

Essential Elements

Following are the essential elements-

- (1) A positive assertion unwarranted, which is not true though the maker believes it to be true.
- (2) A breach of duty which gains an advantage to the doer by misleading another to his prejudice to the other.
- (3) Causing a party to an agreement to make a mistake as to the substance of the agreement.

Nursery Spinning and Weaving Co., 1880 Bom ***: The directors of a company while acting within their authority sold on the company's behalf a bill of exchange to a bank. The company denied liability on the bill.

Dambarudhar v. State of Orissa: The government auctioned certain forest coupes. A part of the land was occupied by tenants. The forest department knew this fact but did not disclose it to the purchaser.

The contract was vitiated by misrepresentation.

Under which section and in which cases agreements are to be proved void?

Section 19: Voidability of agreements without free consent.-When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.-If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.-A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

- (a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.
- (b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.
- (c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and mortgage-debt redeemed.
- (d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.
- (e) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Mistake of Fact and Mistake of Law

What is the difference between Mistake of fact and Mistake of law?

Sections 20, 21 and 22, of the Indian Contract Act deal with mistakes in the formation of the contracts. The rules of law dealing with effect of mistake on contract appear to be established with reasonable clarity. If mistake operates at all it operates so as to the negative or in some cases to nullify consent. The parties may be mistaken in the identity of the contracting parties or in the existence of the subject-matter of the contract at the date of the contract or in the quality of the subject-matter of a contract.

It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them misled by a similarity of name, had a different person or ship in mind no contract would exist between them.

Define Mistake of Fact under sections 20 and 22.

Section 20: Agreement void where both parties are under mistake as to matter of fact.-When both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void.

Explanation.-An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that before the day of the bargain the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts, the agreement is void.

(b) A agrees to buy from B, a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B agrees to sell it to C. B was dead at the time of agreement, but both parties were ignorant of the fact. The agreement is void.

Under section 20 of the Contract Act, a mistake of fact avoids the agreement when both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement. It is necessary that both the parties should be under a mistake.

Ganga Retreat & Towers Ltd. v. State of Rajasthan, MANU/SC/1072/2003 : (2003) 12 SCC 91: In case of common mistake both the contracting parties makes the same mistake. The minds of the contracting parties are ad idem and there is in fact no agreement at all.

Essentials

- (1) Both the parties to an agreement are under a mistake.
- (2) Their mistake should be as to matter of fact.
- (3) Such a fact must be essential to the agreement.

Tarsem Singh v. Sukhminder Singh, MANU/SC/0158/1998 : (1998) 3 SCC 471: Where the defendant intended to sell the land in terms of Kanals, the plaintiff intended to purchase it in terms of 'bighas'. Bighas and Kanal are different units of measurement. Both, convey different impression regarding area of the land. It was held that the agreement is void under section 20.

Fact Essential to the Agreement

- (1) The identity of the parties

(2) The identity and nature of the subject-matter of contract,

(3) The nature and content of the promise itself.

Ayekam Angahal Singh v. Union of India, AIR 1970 Manipur 16: There was an auction for the sale of fishery rights and the plaintiff was the highest bidder making a bid of Rs. 40,000. The fishery rights had been auctioned for 3 years. The rent was Rs. 40,000 per year. The plaintiff sought to avoid the contract on the ground that he was working under a mistake and he thought that he had made a bid of Rs. 40,000 being the rent for all the three years. It was held that since the mistake was unilateral, the contract was not affected thereby and the same could not be avoided.

Remedies.-Sections 65 and 72 provide remedies for the mistake.

Section 65: When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the other person from whom he received it.

Section 72: A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Section 21: Effect of mistakes as to law.-A contract is not voidable because it was caused by a mistake as to any law in force in India but a mistake as to a law not in force in India has the same effect as a mistake of fact.

Illustration.-A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation, the contract is not voidable.

Section 21 of the Contract Act, which lays down that a contract cannot be avoided even if it was caused by a mistake of law gives statutory recognition to this doctrine. A mistake as to a law not in force in India has the same effect as to mistake of fact.

Therefore, it will have followings-

- (i) a agreement under bilateral mistake of law shall be void,
- (ii) a unilateral mistake of law shall not be voidable.

Section 22: Contract caused by mistake of one party as to matter of fact.-A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Explain the rule laid down by the Supreme Court.

Dularia Devi v. Janardan Singh, MANU/SC/0219/1990 : AIR 1990 SC 1173: The Supreme Court held that-

"Where the plaintiff/appellant was totally ignorant of the mischief played upon her. She honestly believed that the instrument which she executed and got registered was a gift deed in favour of her daughter. She believed that the thumb-impression taken from her were in respect of that single document. She did not know that she executed two documents. One of which alone was the gift deed, but the other was a sale of property in favour of all the defendants."

Sales-tax Officers v. Kanhaiya Lal, MANU/SC/0129/1958 : AIR 1959 SC 135: Where a contract has been reduced to writing, or a deed owing to mutual mistake fails to express the concurrent intention of the parties at the time of its execution, the court will rectify the written instrument in accordance with true content.

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CHAPTER VII

Legality of Object

(Section 23)

Section 23: What consideration and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless,—

"Explain the cases in which the agreement is unlawful thereby declared void"?

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies, injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here, B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here, A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful consideration.

(e) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service and B promises to pay 1,000 rupees to A. The agreement is void, as its object is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

Section 23 incorporates among other things three well-settled principles. The first is that an agreement or contract is void if its purpose in the commission of an illegal act the second is that an agreement which is expressly or impliedly prohibited by law is similarly void and the third is that an agreement or contract whose performance is not possible without disobedience of law is again void.

What is the distinction between illegal and void contracts?

Nutan Kumar v. IInd Additional District Judge, Banda, MANU/UP/0052/1994 : AIR 1994 All 298: The distinction between illegal and void contracts is very thin but it is there. The law may either forbid, an agreement to be made or it may

merely say that if it is made the courts will not enforce it. In the former case, it is illegal in the latter only void.

Rajat Kumar Rath v. Government of India, MANU/OR/0010/2000 : AIR 2000 Ori 32: If an agreement is merely collateral to another constitutes and facilitating the carrying out of the object of the other agreement which though void, is not prohibited by law it may be enforced as a collateral agreement. Where a person entering into an illegal contract promises expressly or by implication that the contract is blameless such a promise amount to collateral agreement upon which the other party if in fact innocent of turpitude may sue for damages.

1. Forbidden by Law

When something is forbidden by law an agreement to do that is unlawful section 23 provides that any agreement, the object or consideration of which is forbidden by law is unlawful and therefore void.

Explain the facts of Pearce v. Brooks.

Pearce v. Brooks, (1866) LR 1 EX 213: In this case plaintiff agreed to supply the defendant with a brougham or hire, till the purchase-money was paid by instalment in a period which was not to exceed twelve months. The plaintiff had the knowledge that the defendant was a prostitute and the brougham was to be used by her as a prostitute and to assist her in carrying on her said immoral vocation.

Pollock C.B. observed that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose cannot recover the price of the thing so supplied.

Re Mahmoud and Ispahani, (1921) 2 KB 716: During the war, the sale of linseed oil without a licence from the food controller had been forbidden. The plaintiff agreed to sell linseed oil to the defendant on a false assurance from the defendant that he had such a licence. When the oil was supplied, the defendant refused to accept on the ground that he did not possess the necessary licence. In an action against the defendant for damages for breach of contract it was held that he was not liable as there was no valid contract between the parties.

2. Defeat the Provisions of any Law

If the object or consideration of an agreement is of such a nature that, if it is permitted, it would defeat the provisions of any law, such an agreement is void. Certain acts may not be expressly forbidden by law but if they result in circumventing any law, they cannot be encouraged.

Fateh Singh v. Sanswal Singh, ILR (1878) All 751: The accused was asked to furnish a surety of 5000 rupees for good behaviour in accordance with a provision of section 107 of the Criminal Procedure Code. The accused deposited the sum of 5000 rupees with the defendant and was successful in persuading him to become his surety. After the period of surety-ship, the accused claimed the said amount. He filed this suit to recover the amount.

The Allahabad High Court held that the said agreement was void and therefore the amount could not be recovered because it would defeat the provisions of law.

Ram Sewak v. Ram Charan, MANU/UP/0260/1982 : AIR 1982 All 177: The parties agreed to carry on business in partnership. The agreement provided that they would conceal some part of their business activity and would not enter certain items in the books of accounts with a view to evading payment of Income Tax and Sales Tax.

It was held that the agreement was aimed at defeating the provisions of Tax laws, it was opposed to public policy and therefore, the same was not enforceable.

3. Fraudulent

An agreement made for a fraudulent purpose is void. Where the parties agree to impose a fraud on a third person, their agreement is unlawful where a debtor agreed to pay a separate commission or to give preference to a creditor in order to induce his consent to a composition which is proposed with other creditors, the object of the agreement is fraudulent. For example, A, being agent for a land proprietor, agrees for money without the knowledge of his principal to obtain for B a lease of land belonging to his principal. The agreement between A and B is void as it implies a fraud

by concealment by A, on his principal.

Sita Ram v. Radha Bai, MANU/SC/0012/1967 : AIR 1968 SC 534: The Supreme Court observed that there are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered.

4. Injury to Person or Property of Another

An agreement which involves injury to the property of another person is void under section 23 of the Indian Contract Act and cannot be enforced in law. No claim for damages is sustainable for the breach of such an unlawful agreement. For example if A enters into an agreement with B on the condition that if B destroys the property of C by fire. A would pay B Rs. 5000. This contract is void under section 23 as the consideration is not only unlawful but also involves injury to the property of C.

Ram Swaroop v. Bansi Mandar, ILR (1915) 42 Cal 742: A person executed a bond for rendering manual labour and going to the creditor's house daily until the money borrowed by him was paid in the particular month. The bond also included a stipulation that if the money was not paid by the said month exorbitant interest as penalty was to be paid. The court held it as an agreement opposed to public policy and could not be enforced.

5. Immoral or Opposed to Public Policy

Under section 23 contracts opposed to public policy and immoral would be really void and not illegal, and in that respect Indian law seems to deviate from English law. Immorality depends on the terms accepted by the society at a particular point of time. Generally, the concept of immorality has been given a restricted meaning and it has been confined only to sexual immorality.

Bai Vijle v. Nansa Sagar, (1885) 10 Bom 152: The plaintiff advanced loan to the defendant, a married woman to enable her to obtain divorce against her husband and then marry the plaintiff. The object of the agreement was held to be immoral and the plaintiff was not entitled to recover the loan so advanced.

Illustrations

(1) A, who is B's Mukhtar, promises to exercise his influence, as such with B in favour of C and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(2) A agrees to let her daughter on hire to B for concubinage. The agreement is void because it is immoral though the letting may not be punishable under I.P.C.

Gherulal Parekh v. Mahadeodas Maiya, MANU/SC/0024/1959 : AIR 1959 SC 781: (1959) 2 SCR (Supp) 406: Settlement of consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to marriage for consideration or contract facilitating divorce are held to be void on the ground that the object is immoral.

Pyare Mohan v. Smt. Narayani, MANU/RH/0007/1972 : AIR 1972 Raj 25: In this case gift was passed with the motive of recompensating the plaintiff Smt. Narayani Devi for past cohabitation as well as other services rendered by her as a mistress.

The Rajasthan High Court held that consequently it cannot be said in the present case that the object of the donor was immoral or unlawful. It would have been so if the purpose or design for which the gift was made was future cohabitation between the donor and the donee.

Netyam Venkataramma v. Mahankali Narasimhan, MANU/AP/0045/1994 : AIR 1994 AP 244: If the legislation did not prohibit purchase of land by surplus holder and the only consequence of such purchase would be surrender of surplus land on Redetermination, the transaction is not to oppose to public policy as violate of section 23, Indian Contract Act. Specific performance of such a contract cannot be refused.

Richardson v. Meleish, (1831) Bing 229: Public policy is a very unruly horse and once you get astride it, you never know where will carry you.

Gherulal v. Mahadeodas, MANU/SC/0024/1959 : AIR 1959 SC 781: Subba Rao J. of the Supreme Court observed that public policy or the policy of the law is an illusive concept it has been described as an untrustworthy guide, 'variable quality', 'unruly horse etc.', the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contract which forms the basis of society.

Zoroastrian Co-operative Housing Society Ltd. v. District Registrar Co-operative Societies (Urban), MANU/SC/0290/2005 : AIR 2005 SC 2306: The concept of public policy in the context of the Co-operative Societies Act has to be looked for under the four corners of that Act and in the absence of any prohibition contained therein against the forming of a society for persons of Parsi origin, it could not be held that the confining of membership was opposed to public policy.

B.A. Kanakadevi v. C.S.I.D, Kerela Maha Idavaka, MANU/KE/0556/2007 : AIR 2008 Ker 38: The sale deed expressly mandated that if the assignee failed to construct the college for which the property was purchased, the property would be reconveyed to the assignor.

Renusagar Power Co. Ltd. v. General Electric Co., MANU/SC/0001/1984 : (1984) 4 SCC 679: AIR 1985 SC 1156: The Supreme Court held that it is the fundamental principle of law that orders of the courts must be complied with for any action which involves disregard for such orders would adversely affect the administration of justice and would be distinctive of the rule of law and would be contrary to the public policy.

Heads of Public Policy

Define the heads of public policy.

1. By tending to the prejudice of the State
 - (a) Trading with enemy
 - (b) Sale of public offices and appointments
2. Interference with the administration of justice
 - (a) maintenance
 - (b) champerty
 - (c) agreement to stifle prosecution
 - (d) interference with the cause of justice.
3. Violation of public Decency
 - (a) marriage brokage agreement
 - (b) agreement against marital relation.

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Chapter VIII

Void Agreements

What are void agreements? Explain in brief.

There are some agreements which have been specifically declared as void by the Indian Contract Act. According to section 2(g)-"an agreement not enforceable by law is said to be void." The agreements which have been declared void by the Act are as follows:-

- (1) Agreements of which consideration and objects are unlawful in part (section 24);
- (2) Agreements without consideration (section 25);
- (3) Agreements in restraint of marriage (section 26);
- (4) Agreement in restraint of trade (section 27);
- (5) Agreement in restraint of legal proceedings (section 28);
- (6) Agreement void for uncertainty (section 29);
- (7) Agreement by way of wager (section 30);
- (8) Agreement to do an Impossible Act (section 56).

Section 24: Agreements void if considerations and objects unlawful in part.-If any part of a single consideration for one or more objects, or anyone or any part of any one of several considerations for a single object is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of B a legal manufacturer of Indigo and an illegal traffic in other articles. B promises to pay to A, a salary of 10,000 rupees a year, the agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

When there are two sets of distinct promises and when the void part of the contract can be properly separated from the rest the latter does not become valid.

Alice Nary Hill v. William Clarke, (1905) ILR 27 All 266: The plaintiff, a married woman agreed to live in adultery with the defendant and also agreed to pay the plaintiff a single consolidated remuneration of Rs. 50 per month. It was held that because the lawful part of the contract could not be secured from the unlawful one, the whole of the agreement was void and the plaintiff could not recover anything even for her services as a housekeeper.

Willes J.: Observed that where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them whether the illegality be created by statute or by common law, you may reject the bad part and retain the good.

Section 26: Agreement is restraint of marriage, void.-"Every agreement in restraint of marriage of any person, other than a minor is void."

Suryanarayan Murthi v. P. Krishna Murthy, AIR 1957 Ori 125: An agreement between co-widows that if any of them remarried she should forfeit her right to her share in the deceased husband's property is not in restraint of marriage.

Rao Rani v. Gulab Rani, AIR 1942 All 351: Same as above section 26 is based on the public policy. The institution of marriage has social, family, religious and spiritual importance.

Explain section 27 with the relevant case law.

What are exceptions defined in section 27?

Section 27: Agreement in restraint of trade, void.-Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1: Saving of agreement not to carry on business of which goodwill is sold.-One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

This section seeks to ensure effective exercise of one's right to carry on any lawful profession, trade or any kind of business without any restraint thereon. The principle on which this section is based is in consonance with Article 19 of the Constitution of India under which every citizen has a right to practice any profession or to carry on any profession or to carry on any occupation, trade or business. An agreement will be void under section 27, if the following conditions are satisfied-

- (i) there must be an agreement by which one is restrained from carrying on a profession, trade, business of any kind.
- (ii) Profession, trade, business sought to be restricted must be lawful.
- (iii) The restriction sought to be imposed do not cover any exceptions under section 27 or any other exception recognised under any existing law.

Madhub Chander v. Raj Coomar Dass, (1874) 14 BLR 76: A and B carried on the same kind of business in the same locality in Calcutta. B agreed to pay some amount to A if A closed the business in that locality. A closed his business and then brought an action against B to recover the promised amount. It was held that even though the restriction was merely partial one restraining A from carrying on a particular business only in a certain locality it was still void being in restraint of trade, and, therefore, A was not entitled to recover the amount.

Zaheer Khan v. Percept D'Mark (India) Pvt. Ltd., MANU/MH/1576/2003 : AIR 2004 Bom 362: A contract restricting a party to a contract, her future liberty to carry on his affair in the manner he liked and with person he choose, would be a contract in restraint of trade.

Exceptions: (1) Sale of Goodwill.-Section 27 recognises one exception regarding the restraint upon a person who sells the goodwill of a business, however, to certain conditions-

- (i) restraint must be within specified local limits,
- (ii) restraint must be for the period as long as the buyer or any person deriving title carries on the business.
- (iii) limits of restraint must appear to the court reasonable regard to the nature of the business.

State of Rajasthan v. Bundi Electric Supply Co. Ltd., MANU/RH/0007/1970 : AIR 1970 Raj 36: The Indian Contract Act does not define the word 'goodwill' but in its legal sense the word 'goodwill' means every affirmative advantage as contrasted with negative advantage that has been acquired its carrying on the business.

According to Lord Eldon-The goodwill which has been the subject of sale is nothing more than the probability that the old customer will resort to old place.

Parasullah Malik v. Chandrakanta Das, 39 Ind Cas 177: The plaintiff and the defendant were carrying on the business as carriers of passengers by boats. The plaintiff sold his business to the defendant for a sum of money and agreed to abstain from carrying on a boat business there for a period of three years.

Lord Haldane said their Lordships entertain no doubt that what took place was the sale of goodwill.

The seller can only be restrained from carrying on a similar business and also only for such period for which the business sold is actually carried on either by the buyer or by any person deriving title to the goodwill from him.

Provisions in Partnership Act

What are the provisions in partnership which relate with the section 27? Explain with the help of examples.

Section 11 of Indian Partnership Act, 1932.-Provides that a contract may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

Section 36: Provides that a partner may make an agreement with the partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within specified local limits.

Section 54: Provides that the similar agreement may be made by partner upon or in anticipation of dissolution by which they may restrain each other from carrying on a business similar to that of the firm.

Section 55(3) provides that any partner may upon the sale of the goodwill of a firm.

Exceptions Recognised through Judicial Interpretation

1. Restraint by a contract of service.-An agreement whereby an employee covenants to bind himself not to compete his employer during the term of his agreement is not a restraint of trade.

Charlesworth v. McDonald, ILR (1898) 23 Bom 103: The defendant agreed to serve as an assistant to the plaintiff, a physician and a surgeon at Zanzibar, for a period of three years and not to practice himself during that period. After one year, he left the plaintiff's service and started his own practice in Zanzibar. It was held that the plaintiff was entitled to restrain the defendant from practicing during the period of agreement in Zanzibar.

Deshpande v. Arvind Mills Ltd., MANU/MH/0080/1945 : AIR 1946 Bom 423: An employee entered into an agreement to serve as a weaving master for a period of three years. The agreement contained a stipulation that he would not serve anyone else in India during that period. He left service after one year and started serving as a weaving master in another mill. Holding the agreement reasonable, the court issued the injunction to restrain him from serving as weaving master anywhere else during the unexpired period of the agreement.

2. Trade Combinations.-The primary object of such association is to regulate business and not to restrain it. Combination of this kind are after desirable in the interest of trade itself and also for the promotion of public interest. They bring about standardised goods, fixed prices and eliminating ruinous competition.

Gujarat Bottling Co. Ltd. v. Coca Cola Company, MANU/SC/0472/1995 : AIR 1995 SC 2372: The Supreme Court observed that except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and applies in respect of a restriction which operates after the termination of the contract.

S.B. Frazer & Co. v. Bombay Ice Manufacturing Co., (1904) 29 ILR Bom 107: An agreement between certain ice-manufacturers fixed the minimum price for sale of ice, the proportion of the manufacturer which each was to bear and of profits which each was to receive. Some of them restrained from selling at Poona and some others at steamers.

The agreement was valid as it is regulatory and not to restrain it.

3. Exclusive dealing agreements.-Section 27 declares void all agreements by which anyone is restrained from exercising a lawful profession, trade or business of any kind. It does not forbid contracts which are necessary for carrying on business.

Explain the circumstances in which agreements are void in restraint of legal proceedings.

Section 28: Agreement in restraint of legal proceedings void.-Every agreement-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceeding in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights is void to that extent.

Exception 1.-Saving of contract to refer to arbitration dispute that may arise.-This section will not render illegal

a contract, by which two or more persons agree that may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Exception 2.-Saving of contract to refer questions that have already arisen.-Nor shall this section render illegal any contract in writing, by which two or more persons agreed to refer to arbitration any question between them which has already arisen or affect any provision of any law in force for the time being as to references to arbitration.

Food Corporation of India v. New India Assurance Co. Ltd., MANU/SC/0437/1994 : AIR 1994 SC 1889: The clause in the agreement that the appellant would not have any right under the bond after the expiry of six months from the date of the termination of the contract has been held not to be contrary to section 28 of the Act nor it imposed any restriction to file a suit within six months.

Patel Roadways v. Prasad Trading Company, MANU/SC/0280/1992 : AIR 1992 SC 1514: It has been held that it is not open to the parties by agreement to confer jurisdiction on any court which it did not otherwise possess under section 20 of Code of Civil Procedure.

Delhi Bottling Co. Ltd. v. Times Guaranty Financial Ltd., AIR 2003 (NOC) 7 (Del): It has been held that when two courts have jurisdiction parties are free to vest jurisdiction in one of those courts only.

In this case, there was a hire-purchase agreement in respect of supply of commercial vehicles. The agreement was executed in Bombay. An agreement in such a case by the parties that in case of any dispute Bombay Courts shall have exclusive jurisdiction. The agreement was held to be valid and not hit by

section 28 of the Contract Act.

Define uncertainty with the help of illustrations.

Section 29: Agreements void for uncertainty.-"Agreements, the meaning of which is not certain, or capable of being made certain are void.

Illustrations

(a) A agrees to sell B "a hundred tons of oil". There is something whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell B one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.

(d) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand. There is nothing to show which of the two prices was to be given. The agreement is void.

Chandra Shekhar v. Gopi Nath, MANU/UP/0071/1963 : AIR 1963 All 248: The agreement provided that the tenant is to construct a sitting place and install a new gate and deduct the cost from rent which was enhanced. The cost of the construction was not known to the parties at the time but it is obvious that they agreed that the entire cost would be adjusted against rent.

The agreement was capable of being made certain. It is a valid agreement.

Define wager. Whether wager is void?

Section 30: Agreement by way of wager, void.-Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other

uncertain event on which any wager is void.

Exception in favour of certain prizes for horse-racing.-This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be rewarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not affected.-Nothing in this section shall be deemed to legalize any transaction connected with horse racing to which the provisions of section 294A of the Indian Penal Code (45 of 1860) apply.

Carlill v. Carbolic Smoke Ball Co., (1892) 2 QB 484: Hawkins J. observed that A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that dependant upon the determination of that event, or shall win from the other, and that other shall pay or hand over to him, a sum of money on other stakes, neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of parties.

Essentials of a wagering contract. Explain with the help of illustrations.

Essentials of a wagering agreement.-The essentials of a wagering agreement are,-

- (i) The parties have opposite views regarding an uncertain event
- (ii) There are chances of gain or loss to the parties on the determination of the event one way or the other.
- (iii) The parties have no other interest except winning or losing of bet.

(1) Uncertain event.-According to Anson-An event may be uncertain not only because it is future event, but because it is not yet ascertained at any rate to the knowledge of the parties. Cheshire and Fifoot-Its limitation to a future uncertain event is incorrect, for a wager is nonetheless a wager though it concerns a past or present fact or event.

(2) Mutual Chance of gain or loss.-There should be a chance of anyone party winning and the other closing on the determination of the event one way or the other. If there is no such mutual chance of gain or loss, there is not wager.

Babasaheb v. Rajaram, AIR 1931 Bom 264: It has been held that if out of the gate money which has been recovered, the payment is to be made only to the winner of a certain game, it is not a wagering contract because each party has a chance of winning something but no chance of losing anything.

Diggle v. Hige, (1877) 2 Ex D 422: Each one of the two parties in a walking match deposited ₹ 200 with a stakeholder with the condition that the loser would forfeit the amount of ₹ 200 paid by him. The agreement was held to be a wagering one.

(3) Neither party to have contract over the event.-If either party to a contract, under which money is payable upon the determination of an uncertain event possesses an interest in the subject-matter of the contract that will be affected in value according to the determination of the event, the contract is not void as being a wager.

(4) No other interest in the event.-Neither party should have any interest in the happening of the event other than the sum as stake he will win or lose. The object of the wager is to make a gain purely as the decision of an uncertain event. One party backs his knowledge skill, or luck against that of the other, and in a true wager this is the whole transaction.

Define lotteries.

Lotteries.-Lotteries means games of chance in which the event of either gain or loss of absolute right to a prize or prizes by the person concerned is made wholly dependent upon the drawing or casting of lots and the necessary effect of which is to get a spirit of speculation and gaming that is often productive of serious evils.

Lotteries are prohibited under the Indian Penal Code unless authorised by the Government. Thus a lottery authorized by the

Government is not illegal.

Effects of Wagering Contracts

What are the effects of wagering contracts?

- (1) agreements by way of wager are void.
- (2) no suit shall be brought for recovering anything to be won on any wager, or
- (3) Entrusted to any person to abide the result of any game on other uncertain event on which any wager is made.

Exception to section 30

What are the exceptions of wagering contracts?

(1) Horse Race.-The section does not render void a subscription as contribution, or an agreement to subscribe or contribute, toward any plate, prize or sum of money of the value or amount of five hundred rupees or upwards to the winner or winners of any horse race.

(2) Crossword Competitions.-If skill plays a substantial part in the result and prizes are awarded according to the merits of the solution competition is not a lottery.

Subhas Kumar Manwani v. State of Madhya Pradesh, MANU/MP/0029/2000 : AIR 2000 MP 109: To treat an agreement by way of wager as void is that the law discourages people to enter into games of chance and make earning by trying their luck instead of spending their time, energy and labour for more fruitful and useful work for themselves, their family and the society.

Narayana Ayyangar v. K.V. Ambalam, (1927) ILR 50 Mad 696: A chit-fund does not come within the scope of wager.

Part II

Specific Contracts

(Sections 124-238)

Chapter IX

Contract of Indemnity and Guarantee

Contract of Indemnity

Definition.-According to Halsbury. As indemnity is a contract, express or implied to keep a person, who has entered into or who is about to enter into, a contract or incur any other liability, indemnified against loss, independently of the question whether a third person makes a default.

Explain the facts of Adamson v. Jarvis.

Adamson v. Jarvis, (1827) Bing 66: 5 LJ OS 68: The plaintiff, an auctioneer, sold certain cattle on the instruction of the defendant. It subsequently learned out that the livestock did not belong to the defendant, but to another person, who made the auctioneer liable and the auctioneer in his turn sued the defendant for indemnity for the loss he had thus suffered by acting on the defendant's directions.

The court laid down that the plaintiff having acted on the request of the defendant was entitled to assume that, if what he did, learned to be wrongful, he would be indemnified by the defendant.

According to Chitty: The term indemnity is used in the law in several different times and cases. In its widest sense, it means recompense for any loss or liability which one person has incurred, whether the duty to indemnify comes from an agreement or not. For example where a breach of contract arise gives to a claim for damages, that may include a claim to be indemnified against some loss or liability. In its widest sense, a contract of indemnity includes all contracts of insurance, in its narrow sense, a contract of indemnity is used in contract to a contract of guarantee.

Dugdale v. Lovring, (1875) LR 10 CP 196: "The plaintiffs were in possession of certain trucks which were claimed both by defendants and one K.P.Co. The defendants demanded delivery and the plaintiffs asked for an indemnity bond, but received no reply. Even so they delivered the trucks to the defendant. K.P. Co. having successfully sued the plaintiff for conversion of their property the plaintiff were held entitled to recover indemnity from the defendants on or implied promise as evidenced by fact that by demanding on indemnity they made it quite clear that they had no intention to deliver except on indemnity."

Sheffield Corpn. v. Barclays, (1905) AC 392 (399): Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction or demand of another, whether any default on his own part acts in a manner which is apparently legal but is, in fact illegal and breach of the duty, and thereby incurs liability to third parties, there is implied by a law contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supported duty.

Define contract of indemnity explained in section 124.

Section 124. "Contract of Indemnity" defined.-A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration

'A' contracts to indemnify B against the consequences of any proceedings which C may make against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Section 124 defines the contract of indemnity as a contract by which one party promises to safeguard the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Thus, section 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other

person, but does not deal with those classes of cases where the indemnity arise from loss caused by events as accident which do not or may not depend upon the conduct of the indemnifier or any other person or by reason a liability incurred by something done by the indemnified at the request of the indemnifier.

Tropical Insurance Co. Ltd. v. Zenith Life Insurance Co. Ltd., AIR 1941 Lah 68: Section 124 deals with one particular kind of indemnity which arise from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of indemnifies himself, as by the conduct of any other person or from loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifies or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier.

State Bank of India v. Mula Sahakari Karkhana Ltd., MANU/SC/3353/2006 : AIR 2007 SC 2361: The Supreme Court held that the said document constituted a document of indemnity and not a document of guarantee as is clear from the fact that by reason thereof the applicant was to indemnify the co-operative society against the losses, claims, damages, action and costs may be suffered by it.

New India Assurance Co. Ltd. v. State Trading Corpn of India, AIR 2007 Guj 517: Almost all insurance other than life and personal accident insurance are contracts of indemnity. The insurer's promise to indemnify is an absolute one. We can be filed immediately upon failure of performance, irrespective of actual loss, if the indemnity holder incurred liability and that liability was absolute, he would be entitled to call upon the indemnities to save him from that liability by paying it off.

Explain the rights which are available to indemnity-holder.

Section 125. Rights of indemnity-holder when sued.-The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor,-

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;
- (3) all seems which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Section 125, as the marginal note indicates only deals with the rights of the indemnity-holder in the event of his being saved. Under the section, the promisee is entitled to recover from the promisor damages which he may be compelled to pay in any suit in respect of any matter to which the promise to identify applies.

United Commercial Bank v. Bank of India, MANU/SC/0003/1981 : AIR 1981 SC 1426: Whether it is a bank guarantee, or a letter of credit or contract of indemnity the enforceability of such an instrument against the Bank depends on this terms and conditions of the same.

Cargill International S.A. v. Bangladesh Sugar and Food Industries Corpn., (1996) 4 All ER 563: A person who encashes an indemnity bond which is in the nature of a bank guarantee can retain only that part of the amount of the bond which represents the damage or loss suffered by the bond-holder as a result of the contracting party's breach. Anything more should be undeserved windfall for one party and penalty of the other.

Mohit Kumar Saha v. New India Assurance Co. Ltd., MANU/WB/0023/1997 : AIR 1997 Cal 179: Where a motor vehicle (truck) was under indemnity insurance for Rs. 2,00,000 and it was stated with no chances of recovery, it was held that the proper amount of indemnity was fixed by the surveyor at Rs. 1,87,492, and that it was payable with 18% interest fees the delay period. The settlement of claim at a lesser amount by insurance authorities was arbitrary and unfair under article 14 of the Constitution.

Khetrapal Amarnath v. Madhukar Pictures, MANU/MH/0088/1956 : AIR 1956 Bom 106: The right of the indemnity-holder should not and need not to be confined to those mentioned in section 125 of the Contract Act. Even before damages is incurred by the indemnity-holder, it is open to him to sue for the specific performance of the contract of indemnity, provided it is shown that an absolute liability has been incurred by him and that the contract of indemnity course the said liability.

Praful Kumar Mohanty v. Regional Manager of Oriental Insurance Co. Ltd., (1997) AIHC 2822: An insured motor vehicle was lost by theft. The insurance policy required the assured to send notice to the insurer immediately after theft or any other Criminal Act. The assured made police report of the theft immediately after the incident, but informed the insurer after one month. The question was whether this could be regarded as a notice given immediately. The court said the expression immediately implies notice to be given with promptitude avoiding unnecessary delay. Immediate police report showed the bona fide of the assured in the matter.

Contract of Guarantee (Sections 126-147)

Define the terms 'contract of guarantee', 'surety', 'principal debtor', 'creditor'.

Section 126. 'Contract of guarantee', 'surety', 'principal-debtor' and 'creditor'-A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal-debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

In order to constitute a contract of guarantee, there must be concurrence of the principle-debtor, the creditor and the surety, but that does not mean that there must be evidence showing that the principal-debtor undertook his obligation at the express request of the principal-debtor as implied request will be quite sufficient to satisfy this requirement. The function of a contract of guarantee is to enable a person to get a loan on goods on credit, or an employment. Some person comes forward and tells the lender, on the supplies on the employer that he may be trusted and in case of any default 'I undertake to be responsible'-For example-

Birkmyr v. Darwell, (1704) 91 ER 27: 1 Salk 27: The court held that if two come to a shop and one buys, and the other to give him credit, promises the seller, if he does not pay you, I will.

In English law, guarantee is defined as a promise to answer for the debt, default or miscarriage of another if in a collateral engagement to be liable for the debt of another in case of his default. Guarantees are casually taken to provide a second pocket to pay if the first should be empty.

According to Chitty: A contract of suretyship is in essence a contract by which one person (the surety) agrees to answer for some liability of another (principle-debtor) to a third person (creditor). So it is obvious that there must be principal debt. There can be no contract of guarantee unless and until there is a principal debt.

Parties.-There are three parties in case of contract of guarantee, these are surety, principal-debtor and creditor.

Punjab National Bank v. Sri Vikram Cotton Mills, MANU/SC/0032/1969 : AIR 1970 SC 1973: There must be conditional promise to be liable on the default of the principal-debtor. A liability which is incurred independently of a default is not within the definition of guarantee.

Interior's India v. Balmer Lawrie, AIR 2007 Del 16: A bank guarantee is the common mode of securing payment of money in commercial dealing as the beneficiary under the guarantee, is entitled to realize the whole of the amount under that guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the guarantee was given and the beneficiary.

Daewoo Motors India Ltd. v. Union of India, MANU/SC/0152/2003 : (2003) 4 SCC 690: Once it becomes apparent that there was no chance to fulfil the condition in the bank guarantee, invocation of the bank guarantee would not be premature or unjustified.

Syndicate Bank v. Vijay Kumar, MANU/SC/0196/1992 : AIR 1992 SC 1066: It is well-settled that bank guarantee is an autonomous contract. It is in common parlance that the issuance of guarantee is what a guarantor creates to discharge

liability when the principal-debtor fails in his duty and guarantee is in the nature of the collateral agreement to answer for the debt.

What consideration is required for formation of contract of guarantee?

Section 127. Consideration for guarantee.-Anything done or any promise made, for the benefit of the principal-debtor, may be a sufficient consideration to the surety for giving the guarantee.

Section 127 itself makes it clear that consideration is an essential element of a contract of guarantee. A contract of guarantee will not be enforceable in the absence of a valid consideration. Without consideration, agreement is void.

Illustrations

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promise to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as required. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

A guarantee for a past as well as future debt is enforceable provided some further debt is incurred after the guarantee. But there should be a clear undertaking to be liable for a past debt and as soon as some fresh obligation is incurred, the liability for all the obligation is coupled up.

A counter-guarantee is for protection of the original guarantor. When the original guarantor is called upon to pay and he has fulfilled his obligation under his guarantees, he can call upon the counter guarantor to pay him.

Section 128. Surety's liability.-The liability of the surety is co-existence with that of the principal-debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

Kerala State Financial Enterprises Ltd. v. C.J. Thampi, MANU/KE/0440/2000 : AIR 2000 Ker 36: The liability of the sureties in co-existence with that of the principal-debtor. Consequently creditor can proceed against the principal-debtor or against the sureties, unless it is otherwise provided in the contract. The same should also be principle with regard to the rights and liabilities between co-sureties as well. A co-surety cannot insist that the creditor should proceed either against the principal-debtor as against other sureties before proceeding against him.

Kailash Nath Agarwal v. Pradeshiya Industrial and Investment Corporation of U.P. Ltd., MANU/SC/0114/2003 : (2003) 4 SCC 305: The clauses of the guarantees executed by the appellant in favour of PICUP clearly show that the liability of the guarantors was to remain unaffected by the failure of PICUP to enforce its mortgage and hypothecation against the assets of the Company. There is nothing in the contracts which can in any way be construed as contrary to the joint and several liability created under section 128.

Define continuing guarantee and also explain the revocation of continuing guarantee.

Section 129. 'Continuing guarantee'.-A guarantee which extends to a series of transactions, is called a 'continuing guarantee'.

Illustrations

(a) A, in consideration that B will employ C in collecting the rents of B's zamindari, promises to B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of ₹ 100, for any tea he may from time-to-time supply to C. B supplies C with tea of above the value of ₹ 100, and C pays B for it. Afterwards, B supplies C with tea of the value of ₹ 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of ₹ 100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Margaret Lalita v. Indo. Commercial Bank Ltd., MANU/SC/0292/1978 : AIR 1979 SC 102: The Supreme Court observed that in the case of a continuing guarantee and an undertaking by the defendant to pay any amount that may be due by a company to a Bank on the general balance of its account or any other account. So long as the account in a live account in the sense that it is not settled that there is a refusal on the part of the guarantor to carryout the obligation, the period of limitation for a suit to enforce that bond could not be said the have commenced running.

State Bank of India v. Gemini Industries, (2001) 3 Guj CD 1885: A guarantee for a cash-credit account has been held to be a continuing guarantee. The sureties could not claim to be discharged from their liability by reason of the fact that the goods in the hypothecated store were changed.

Section 130. Revocation of continuing guarantee.-A continuing guarantee may at any time be revoked by the surety, as to future transaction, by notice to the creditor.

Illustrations

(a) A, in consideration of B's discontinuing, at A's request, bill of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C, C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Eghert v. N.N.C. Bank, AIR 1918 PC 210: A continuing guarantee can be invoked by the surety by giving notice to the creditor as regards future transactions only. The guarantee will remain in force until it is revoked by giving a notice by each and all the guarantors.

Hargopal Agarwal v. State Bank of India, AIR 1956 Mad 211: Where the directors of a company guaranteed the payment of the company's over draft and subsequently resigned their office and the bank was informed it was held that the liability of the directors would be confined to the amount due up to the date of their resignation.

Section 131. Revocation of continuing guarantee by surety's death.-The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

R.K. Dewan v. State of Uttar Pradesh, MANU/UP/1350/2004 : AIR 2005 All 202: The liability of deceased surety can be imposed against his legal heirs but only to the extent of the property inherited by them.

Durga Piya v. Durga Pada, MANU/WB/0075/1927 : AIR 1928 Cal 204 (206): Thus if surety dies, the continuing guarantee regarding future transaction will stand revoked. But if there is any contract to the contrary the surety will not be discharged from his liability.

Section 132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be

surety on other's default.-Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and B make a joint and several promissory notes to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

The principle of the section is that whatever be the arrangement between the joint-debtors as to their liability to the creditor they remain joint-debtor. The creditor is not concerned with their mutual agreement that one would be a principle and other a surety. Where the creditor knows of any such arrangement, he must refrain from doing anything which would have the effect of discharging the surety under section 133, 134 or 135.

Discuss in brief in which surety is discharged for performance of contract?

Section 133. Discharge by surety by variance in terms of contract.-Any variance, made without the surety's consent, in the terms of the contract between the principal-debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B's conduct as manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to over-draw, and the bank loses a sum of money.

A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duty accounting for monies received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then, existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January, A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the first of March.

M.S. Anirudhan v. Thomco's Bank, MANU/SC/0042/1962 : AIR 1963 SC 746: Section 133 of the Contract Act makes quite that if the principal-debtor and the creditor makes any alteration in the contract of guarantee without the surety's consent, the surety will stand discharged as to transactions subsequent to the variation or alteration. The law now accept that 'unsubstantial alteration in an instrument which are to benefit of the surety do not discharge the surety from the liability. Of course, if the alteration is to be disadvantage of the surety, or its unsubstantial character is not self-evident. The surety can claim to be discharged.

Satish Chandra Jain v. National Small Industries Corpn. Ltd., MANU/SC/0893/2001 : AIR 2003 SC 623: Where a

guarantee was given for the loan amount of the principal-debtor with a bank and the bank opened a second account in the name of the

principal-debtor into which considerable payments were received. The surety was held to have been discharged.

Male Venkateshwarulu v. S.B.I., AIR 2006 AP 508: The liability of the guarantor would not automatically cease or come to an end merely because he had not signed revival letters. The fact that the guarantor was no longer willing to continue with the guarantee did not end the guarantee as his liability under it.

Section 134. Discharge of surety by release or discharge of principal-debtor.-The surety is discharged by any contract between the creditor and the principal-debtor, by which the principal-debtor is released, or by any act or omission of the creditor, the legal consequences of which is the discharge of the principal-debtor.

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation for A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantees.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time. B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his guarantee.

Since Surety's liability is co-exclusive with that of the principal-debtor if principal-debtor is discharged he is also discharged from his liability. Section 134 provides two modes-(i) a contract between the creditor and the principal-debtor in which the principal-debtor is discharged, or (2) by any act or omission of the creditor, which has the legal effect of discharge of the principal-debtor.

Maharashtra Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam, MANU/SC/0024/1982 : AIR 1982 SC 1497: A surety is no doubt discharged under section 134 of Indian Contract Act by any contract between the creditor or by any act or omission of the creditor, the legal consequence of which he is the discharge of the principal-debtor may secure by operation of law in bankruptcy does not absolve the surety of liability.

If the right of the creditor to sue or receive money from the surety are reserved by an agreement, a mere undertaking by the creditor not to sue the principal-debtor a binding agreement to give him time does not operate as a discharge of the surety.

Section 134. Is merely declaratory of what the law of England was and is. However, a discharge which the principal-debtor may secure by operation of law in bankruptcy or in liquidation proceedings in the case of a company, does not absolve the surety of his liability.

How surety can be discharged on the compounding giving extra time to the debtor principal?

Section 135. Discharge of surety when creditor compounds with, gives time to, agrees not to sue, principal-debtor.-A contract between the creditor and the principal-debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal-debtor, discharges the surety, unless the surety assents to such contract.

The principle underlying in this section is that if without surety's consent the creditor enters into a contract, they should be allowed to be discharged when a new contract has been entered into between the creditor and the principal-debtor either to make composition with him, or to promise to give him time or promise not to sue him. The objection that creditor should not be allowed to do something prejudicial to the interest of the surety unless the surety gives his consent to it. Based on this

principle, a surety will stand discharged under this section if the following elements are satisfied-

- (a) The creditor and the principal-debtor enters into a new contract without the surety's consent,
- (b) Under such a contract the creditor makes the following promises-
 - (i) The creditor makes a composition with the debtor,
 - (ii) The creditor promises to give time to the debtor to make payment,
 - (iii) The creditor promises not to sue the principal-debtor.

When the time for the payment of the guaranteed debt comes, the surety was the right to require the principal-debtor to pay off the debt. Accordingly, it is one of the duties of the creditor towards the surety not to allow the principal-debtor more time for payment. The creditor has no right, it is against the faith of his contract to give time to the principal, even though manifestly for the benefit of the surety without the consent of the surety.

Ushadevi v. Bhagwan Das, MANU/MP/0077/1967 : AIR 1967 MP 250: It is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle that if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy.

Section 136. Surety not discharged when agreement made with third person to give time to principal-debtor.-When a contract to give time to the principal-debtor is made by the creditor with a third person, and not with the principal-debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B contracts with M to give time to B. A is not discharged.

If the creditor under an agreement with the principal-debtor promises not to sue him, the surety is discharged. The main reason is that a surety is entitled any time to require that creditor to call upon the principal-debtor to pay off the debt. "When it is due and this right is positively violated when the creditor promises not to sue the principal-debtor.

Section 137. Creditor's forbearance to sue does not discharge surety.-Mere forbearance on the part of the creditor to sue the principal-debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

According to section 134 if the creditor is guilty of any act or omission the legal consequences of which is the discharge of the principal-debtor, the surety is also discharged. The omission to sue the principal-debtor within the period of limitation definitely discharges him thus of section 134 stood alone the surety is also discharged.

Discuss the liabilities of co-surety.

Section 138. Release of one co-surety does not discharge others.-Where there are co-sureties, a release by the creditor of one of them does not discharge the others, neither does it free the surety so released from his responsibility to the other sureties.

Liabilities of the sureties under the law is joint and several, if a creditor seeks to enforce the surety bond against some only of the joint sureties the other sureties will not on that account be discharged, nor will release by the creditor of one of them discharge the other.

Section 139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.-If the creditor

does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal-debtor is thereby impaired, the surety is discharged.

Illustrations

(a) B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this pre-payment.

(b) C lends money to B on the security of a joint and several promissory notes made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

According to Pollock and Mulla: Section 139 is a residuary section the object of which is to ensure that no arrangement different from that contained in the surety's contract is forced upon him and surety if he pays the debt has the benefit of every remedy which the creditor had against the principle-debtor.

Jammu and Kashmir Bank Ltd. v. Choudhary Prakash Chand, AIR 2006 J&K 11 (15): Where in a guarantee deed in respect of vehicle loan guarantor admitted his signature and there was nothing to show that the said signature was obtained by coercion or fraud and the guarantee deed did and contain any loran that the plaintiff bank was obliged to do any act such as sale hypothecated vehicle, the liability of the guarantor would not be discharged because in the guarantee deed the liability of guarantor in co-extensive with that of the principal-debtor and there being no clause in the guarantee deed providing contrary to the contract.

T. Raju Setty v. Bank of Baroda, AIR 1992 Karn 108: The rights conferred on the surety are not inalienable rights nor those rights have anything to do with the public policy as such. Public policy is not to defeat the debt of the creditor; it is to ensure that the money of the creditor is secured and is recoverable in accordance with the law. A debtor or surety is not absolved of his liability to discharge the debt except in accordance with the provision of law.

Section 140. Right of surety on payment or performance.-Where a guaranteed debt has become due, on default of the principal-debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal-debtor.

Ram Sagar Singh v. Yogender Narain Pd. Singh, AIR 1975 SC 239: The court observed that in order to apply this doctrine i.e., *res judicata* between co-defendants, there must be (1) a conflict of interest between the co-defendants, (2) the necessity to decide that conflict in order to give the plaintiff the appropriate relief, (3) a decision of that question between the co-defendants. The court held that under such circumstances, a suit by surety against the principal-debtor to recover such amount is not barred by constrictive *res judicata*.

Bank of Bihar Ltd. v. Dr. Damodar Prasad, MANU/SC/0220/1968 : AIR 1969 SC 297: Where a decree is obtained by the creditor, it is the duty of the surety to pay the decretal amount and upon such payment he will be subrogated to the rights of the creditor under section 140. He may then recover the amount from the principal-debtor. The way object of the guarantee in defeated if the creditor is asked to postpone his remedies against the surety.

C.K. Aboobacker v. K.P. Ayishu, AIR 2000 Ker 29: A guarantor will get invested with all the rights which the creditor had only "Upon payment or performance of all that he is liable for". A guarantor is liable for any payment or performance of any obligation only to the extent the principal-debtor has defaulted.

Section 141. Surety's right to benefit of creditor's securities.-A surety is entitled to the benefit of every security which the creditor has against the principal-debtor at the time when the contract of suretyship is entered into, whether the surety

knows of the existence of such security or not, and if the creditor loses, or without the consent of the surety, parts with such surety is discharged to the extent of the value of the security.

Illustrations

(i) C, advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C, cancels the mortgage. B becomes insolvent and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(ii) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(iii) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

Industrial Finance Corporation of India Ltd. v. Cannanore Spinning and Weaving Mills Ltd., MANU/SC/0317/2002 : (2002) 5 SCC 54: Creditor cannot be said to have lost or parted with a security, without consent of the surety, unless there has been some voluntary act by him. This section recognises and incorporates the general rule of equity in which the surety is entitled to every remedy which the creditor has against the principle-debtor including enforcement of every security.

Under the English law, the surety is entitled to the securities given to the creditor both before or after the contract of surety, whereas the law contained in section 141 of the Indian Contract Act, restricts the surety's right to securities held by the creditor at time of his becoming surety.

State of Madhya Pradesh v. Kaluram, MANU/SC/0068/1966 : AIR 1967 SC 1105: The surety is entitled on payment of the debt or performance of all that he is liable for the benefit of the rights of the creditors against the principal-debtor which arise out of the transaction which gives rise to the right or liability. The surety is on payment of the amount due by the principal-debtor entitled to be put in same position in which the creditor stood in relation to the principal-debtor.

When is a guarantee proved to be invalid?

Section 142. Guarantee obtained by misrepresentation, invalid.-Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Section 143. Guarantee obtained by concealment, invalid.-Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstances, is invalid.

Illustrations

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequences call upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tonnes. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Balkrishna V.N. Kirtrikar v. Bank of Bengal, (1891) 15 Bom 585: Bombay High Court stated that the expression 'keeping silence' in that section clearly implied intentional concealment as distinguished from mere non-disclosure which no doubt was a fatal objection in insurance policies.

Section 144. Guarantee on contract that creditor shall not act on it until co-surety joins.-Where a person gives a

guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Section 145. Implied promise to indemnify surety.-In every contract of guarantee there is an implied promise by the principal-debtor to indemnify the surety, and the surety is entitled to recover from the principal-debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B, a sum of money, and A, at the request of B, accept a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the Bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the Bill the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

This section enacted the following three important principles-

- (i) In every contract of guarantee, there is an implied promise by the principal-debtor to indemnify the surety;
- (ii) The surety is entitled to recover from the principal-debtor whatever sum he has rightly paid under the guarantee;
- (iii) But the surety is not entitled to recover from the principal debtor any sum which he had paid wrongfully.

United Commercial Bank Ltd. v. Okara Grain Buyers Syndicate Ltd., MANU/SC/0003/1968 : AIR 1968 SC 1115: Where a person stands surety for another, there is always an implied warranty by the latter that he would indemnify such person in case he has indemnified owing to default by him in the performance of any of the conditions imposed upon him under the security bond.

Section 146. Co-sureties liable to contribute equally.-Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal-debtor.

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

Section 147. Liability of co-sureties bound in different sums.-"Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligation permit."

Illustrations

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty

of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly according to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay the full penalty of his bond.

Discuss the point of distinction between a contract of guarantee and contract of indemnity.

Distinction Between A Contract of Guarantee and A Contract of Indemnity

"A contract of indemnity" is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any person.

"A contract of guarantee" is the contract to perform the promise, or discharge the liability of a third person in case of his default.

Periyamma Marakkaya v. Banians and Co., MANU/TN/0399/1925 : AIR 1926 Mad 544: The Madras High Court observed that the Contract Act draws a distinction between contracts of indemnity and contracts of suretyship, and that contract of suretyship, unlike contract of indemnity, require the concurrence of three persons namely principal-debtor, the creditor and the surety. The points of distinction are as,-

- (1) A contract of guarantee, unlike a contract of indemnity which is bilateral, is tripartite where three persons of the principle-debtor, creditor and surety are involved. But, it is not necessary or sine qua non that the principal-debtor must expressly be a party to the document of guarantee, as it is adequate if the principle-debtor is a party by implication.
- (2) In an indemnity, there is one contract, that is contract of indemnity against loss between the indemnity-holder and the indemnifier. But in a guarantee there are three contracts, namely, a contract of loan between the principal-debtor and a creditor, between the creditor and the surety and implied contract between the principle-debtor and the surety.
- (3) The undertaking in a guarantee is collateral, in an indemnity it is original. The purpose of a guarantee is to support the primary liability of a third person. In an indemnity, there being no third person, the indemnifier's liability is an itself primary.
- (4) If surety discharges the debt payable by the principal-debtor, he steps into shoes of creditor and becomes entitled to realise the money paid in his own right while in case of contract of indemnity the indemnifier must always bring the suit in the name of the indemnified and cannot sue third parties in his own name.
- (5) A contract of guarantee is only a consequential contract. The original contract is between the creditor and the debtor. While, in case of indemnity it is an original and direct contract between indemnifier and indemnified.

Chapter X

Of Bailment

(Sections 148-171)

Explain the definition of Bailment, bailor and bailee under section 148.

Section 148. 'Bailment', 'bailor' and 'bailee' defined.- "A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

Explanation.-If a person is already in possession of the goods of other contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment."

A 'bailment' is thus a delivery of goods on condition that the recipient shall ultimately restore them to the bailor or dispose of them according to the direction of the bailee or dispose of them according to the directions of the bailor. Common example of bailment are hiring of goods, furniture or a cycle, delivering of cloth to a tailor for making a suit, delivering a watch or scooter for repair, depositing goods for safe custody etc.

Pollock and Wright: Any person is said to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing from another upon an undertaking with the other person either to keep and return or deliver to him the specific thing or to apply the specific thing according to the direction antecedent or future of the other person. Bailment implies a sort of relationship in which the personal property of one person temporarily goes into the possession of another. The ownership of the articles or goods is in one person and the possession in another.

Anamalai Timber Trust Ltd. v. Trippunitura Devaswom, AIR 1954 KLT 60: Where there is no obligation to return identical subject-matter, either in its original or in an altered form there can be no bailment. Therefore, bailment involves change of possession.

Haatmal Bhutoria v. Dominion of India, MANU/WB/0009/1961 : AIR 1961 Cal 54: Section 148 makes it clear that a seller can become a bailee if he contracts to hold the goods as a bailee. In the absence of such a contract he cannot be regarded as a bailee.

Kavita Trahan v. Balsara Hygiene Products Ltd., AIR 1992 Del 103: One of the requirements of bailment is delivery of goods to the bailee. Delivery of possession to the bailee is sine qua non of bailment. In order to constitute, a bailment change of possession is necessary.

What are the essential elements of a valid bailment? Explain with the help of examples and case-laws.

Essential Elements of a Valid Bailment.-According to Chetty the important feature of bailment is the transfer of possession of the thing to the bailee (on the acquisition of possession by him) so that the bailee is entitled to possession remedies against all strangers and even in many cases, against the bailor himself.

(1) Delivery of Possession.-Delivery of goods to another person for some purpose is an essential element of bailment.

Vtzen v. Nicolls, (1894) 1 QB 92: "An old customer went into a restaurant for the purpose of dining there when he entered the room a waiter took his coat, without being asked, and hung it on a hook behind him. When the customer rose to leave the coat was gone.

What the waiter did might be no more than an act of voluntary courtesy towards the customer, yet the restaurant-keeper was held liable as a bailee. The waiter by taking the coat into his possession had relieved the plaintiff of its care and had thus assumed the responsibility of a bailee. It was he who selected the place where the coat should be put.

Kaliaperumal v. Ulsalakshmi Achi, AIR 1938 Mad 42: To constitute the bailment the delivery must be of the goods bailed and not mere document of the title vis-a-vis the goods. So where a person gave the railway receipt of goods to the plaintiff as security for loan it was held that the plaintiff was in no sense a bailee. It is only a respect of immovable property that an equitable mortgage can be created by handing over the title deeds of the property.

(2) Delivery of Possession upon a Contract.-Bailment is a relationship sui generis and unless it is sought to increase or diminish the burdens imposed upon the bailee by the very act of the bailment, it is not necessary to incorporate it into the law of contract and to prove a consideration.

Ram Gulam v. State of Uttar Pradesh, MANU/UP/0079/1950 : AIR 1950 All 206: In this case some stolen ornaments were in the custody of the police, they were again stolen and this time they could not be recovered. The plaintiff sued the government for the loss of ornaments. But his action was dismissed by Allahabad High Court on the ground that the possession of the goods was not under a contract. Since ornament were not delivered under a contract, the government never occupied the position of a bailee.

The decision of the Allahabad High Court in this case seems to be erroneous. This is based on the wrong assumption that a bailment cannot arise independently of contract.

(3) Bailee bound to return goods or to dispose of according to the direction of Bailor.-If the person to whom the goods are delivered is not bound to restore them to the person delivering them or to deal with them according to his mandate, their relationship will not be that of bailor and bailee.

Jagdish Chandra Prikha v. Punjab National Bank, AIR 1998 Del 266: Where a box containing gold jewellery and ornaments were entrusted to a Bank and the custody of box always remained with Bank, the ornament and jewellery were found missing when produced before that court, it was held that the Bank failed to discharge its duties as bailee and the heirs of bailor would be entitled to the price to market value of gold ornaments at the time of the institution of the suit alongwith simple interest at the rate of 12% per. annum.

South Australian Insurance Co. v. Randell, (1869) 3 PC 101: The Privy Council observed, "where there is a delivery of property on a contract for an equivalent in money or some other valuable commodity and not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property in value a sale and not a bailment."

How delivery is made to bailee by bailor?

Section 149. Delivery to bailee how made.-The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

The question as to how such delivery of goods can be made is dealt with in section 149 which provides that the delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf. Where the bailee never intended to receive the goods. No delivery of possession without a conscious act on the part of bailee under section 149.

What are the legal obligations imposed by law on bailor and bailee?

Section 150. Bailor's duty to disclose faults in goods bailed.-The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If such goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustration

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

Pollock and Mulla: Have aptly pointed out, "the language of this section is open to at least three constructions-

- (i) The bailor is under a duty to take reasonable care to make the goods reasonably safe for the purpose for which they have been hired.
- (ii) The bailor is under a duty to supply goods that are reasonably safe, the only defence being that the defect is a latent one that could not be discovered by any care as skill.
- (iii) There is an absolute guarantee of fitness"

A person, who lends his cycle or horse to a friend, and if he knows that the cycle is without brakes or that the horse is unsound, he should disclose this fact and his duty ends there.

Section 151. Care to be taken by bailee.-In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Union of India v. Amar Singh, MANU/SC/0004/1959 : AIR 1960 SC 233: In this case, some goods were consigned from Quetta in Pakistan to New Delhi. After the goods were carried by Pakistan Railway, they were carried by Indian Railway as the forwarding Railway. The goods were lost in the transit. The liability of forwarding Railway is governed by section 72 of the Railways Act according to which liability for the loss of goods bailed to the Railway is subject to the provisions of Railway Act, that of a bailee, under sections 151, 152 and 161 of Indian Contract Act.

The Supreme Court held that Indian Railway guilty of negligence for they did not take as much care of the goods as an ordinary man would have taken of his own goods.

Subba Rao observed under section 151, the bailor is bound to take such care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take to his goods of the same bulk quantity and value of the goods bailed.

Kavita Trehan v. Balsara Hygiene Products Ltd., AIR 1992 Del 103: In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would render under similar circumstances.

Section 152. Bailee when not liable for loss, etc., of things bailed.-The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

R. v. Viscount Hertford, (1681) Shower 172: If money be given to one to keep generally without consideration and if the person be robbed, he is discharged. Where the bailor's goods are stolen from custody of the bailee, he will be liable if there has been negligence on his part. Where the plaintiff stayed at a hotel and his articles were stolen while he was away the hotelier was held liable as the room was, to his knowledge, in an insecure condition.

What are the grounds on which contract of bailment is terminated?

Section 153. Termination of bailment by bailee's act inconsistent with conditions.-A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

154. Liability of bailee making unauthorised use of goods bailed.-If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Banaras. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

Goods must be used by that bailee strictly for the purpose for which they have been bailed to him. Any unauthorised use of goods would make the bailee absolutely liable for any loss of or damage to the goods. Even an act of God or inequitable accident would be no defence. A horse lent for riding should not be used for any other purpose and it is used outside the scope of the bailment, the bailee would be liable for any damage to the horse howsoever happening.

What are the effects of mixture with or without bailor's consent?

Section 155. Effect of mixture, with bailor's consent, of his goods with bailee's.-If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Section 156. Effect of mixture, without bailor's consent, when the goods can be separated.-If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively, but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

Section 157. Effect of mixture, without bailor's consent, when the goods cannot be separated.-If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

Section 158. Repayment, by bailor, of necessary expenses.-Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Section 158 deals with repayment of necessary expenses by bailor under the following circumstances-

(i) the goods are to be kept or to be carried to have work done upon them by the bailee for the bailor as per the conditions of the terms,

(ii) The bailee is to receive no remuneration for the same.

If these conditions are satisfied, the bailor shall be under obligation to repay to the bailee the necessary expenses incurred by him for the purpose of the bailment. whether a person would be entitled to claim any charges for keeping the goods until the delivery would depend on the terms of the contract. If the bailee has to incur any expenditure for the preservation of the goods from deterioration not provided for in the contract of bailment, the bailee will be entitled to recover such expenditure from the owner in as much as the owner will derive benefit therefrom if ultimately the goods are delivered to the owner.

Surya Investment Co. v. State Trading Corporation of India, MANU/WB/0009/1987 : AIR 1987 Cal 46: A bailee cannot lose the

possession as well as charges for bailment. Further, it is stated that a petitioner cannot be denied his claim for storage charges solely on the ground that the petitioner has claimed or exercised the right of lien and therefore, he is not entitled to get any charge for keeping the goods bailed.

Section 159. Restoration of goods lent gratuitously.-The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Section 160. Return of goods bailed, on expiration of time or accomplishment of purpose.-It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Section 161. Bailee's responsibility when goods are not duly returned.-If by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Union of India v. Amar Singh, MANU/SC/0004/1959 : AIR 1960 SC 233: The Goods received by Indian Railway as forwarding Railway were lost, the Government was held liable because the Railway failed to return the goods. Similarly. Where books were given for binding and were not returned within reasonable time and were lost due to fire, the bailee was held liable for loss, although he was not responsible for fire.

When the purpose of bailment is accomplished or the time for which the goods were bailed has expired, the bailee should return the goods to the bailor without demand. If he fails to do so, he will keep the goods at his risk and will be responsible for any loss of or damage to the goods at his risk and will be responsible for any loss of or damage to the goods arising howsoever.

Shaw & Co. v. Symmons & Sons, (1917) 1 KB 799: The plaintiff entrusted books to the defendant, a bookbinder, to be bound the latter promising to return them within a reasonable time. The plaintiff having required the defendant to deliver the whole of the books then bound the defendant failed to deliver them within a reasonable time and they were subsequently burnt in an accidental fire on his premises.

The defendant was held liable in damages for the loss of the books. When the loss takes place while the bailee's wrongful act in operation, there is no question of any defence like 'act of God;' or inevitable accident' being setup. He is liable in any case.

Section 162. Termination of gratuitous bailment by death.-A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

163. Bailor entitled to increase or profit from goods bailed.-In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Under this section bailor is entitled to any increase or profit which may have accrued from the goods bailed. As such the bailee is under statutory obligation to deliver to the bailor any increase or profit derived from the goods bailed.

Motilal Hirabhai v. Bai Mani, AIR 1925 PC 8: The Privy Council held that new shares allotted in respect of old shares pledged by a person are increase or profit within the meaning of section 163 and hence the pledger can successfully claim them.

Standard Chartered Bank v. Custodian, AIR 2000 SC 1488: When section 163 of the Contract Act really means is that

accretion in respect of the goods bailed cannot be a property of the bailee but must be returned when the goods themselves bailed are returned. A necessary corollary to this would be that as the pledge extends to such accretions then when the goods are returned these accretions must also be given back.

Section 164. Bailor's responsibility to bailee.-The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

If the bailor has no right to bail the goods, or to receive them back or to give directions respecting them and consequently the bailee is expected to some loss, the bailor is responsible for the same.

Section 165. Bailment by several joint owners.-If several joint owners of goods bail them, the bailee has no title to the goods, and the bailee in good faith, delivers them back to, or according to the direction of, the bailor the bailee is not responsible to the owner in respect of such delivery.

Section 166. Bailee not responsible on re-delivery to bailor without title.-If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the direction of the bailor, the bailee is not responsible to the owner in respect of such delivery.

Section 166 deals with responsibility of a bailee in a case where the bailor does not have title to the goods the bailee will not be responsible to the owner in case he delivers the goods bailed to the bailor or deliver them to any other person according to his direction if the bailee has acted in the good faith.

Section 167. Right of third person claiming goods bailed.-If a person, other than the bailor, claims goods bailed he may apply to the court to stop delivery of the goods to the bailor, and to decide the title to the goods.

Banwarilal v. Road Transport Corporation, MANU/BH/0052/1989 : AIR 1989 Pat 303: Bailee is protected from the consequences of wrong delivery if he acts in good faith in delivering them back to or in accordance with the instruction of the bailor who has no title to the goods.

Section 167 confers right on the third person who claims title to the goods bailed. The remedy which is provided to him under this section is that he may apply to the court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Section 168. Right of finder of goods, may sue for specific reward offered.-The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Section 169. When finder of thing commonly on sale may sell it.-When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses upon demand, to pay the lawful charges of the finder, the finder may sell it-

- (1) when the thing is in danger of perishing or of losing the greater part of its value, or
- (2) when the lawful charges of the finder, in respect of the thing found, amount to two-third of its value.

Sections 168, 169 protect the interest of a finder in two ways. Section 168 allows the finder to retain the goods against the owner until he receives compensation for trouble and expense where the owner has offered a specific reward for the return of the goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

Section 169 allows the finder to sell the goods in certain circumstances where the things found is commonly the subject of sale and if the owner cannot be found with reasonable diligence, or if refuses to pay the lawful charges of the finder, the finder may sell the goods in the following cases:-

- (i) when due thing is in danger of perishing or of losing greater part of its value, or

(ii) when the lawful charges of the finder, in respect of the thing found amount to two-third of its value.

Define lien. What are the kinds of lien? Explain with the help of examples.

Section 170. Bailee's particular lien.-Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the service he has rendered in respect of them.

Illustrations

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months credit for the price. B is not entitled to retain the coat until he is paid.

Right of Lien.-According to Halsbury's law of England. "Lien is in its primary sense of right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied."

Syndicate Bank v. Vijay Kumar, MANU/SC/0196/1992 : AIR 1992 SC 1066: Lien means right to retain a property or goods until some charges due upon it or services rendered for its improvement, are paid. It is simply a right to retain the thing and does not give any right of property or ownership to bailee. If the bailee has rendered any service by exercise of labour or skill in respect of the goods, he gets the right to retain the goods until he gets the remuneration for the service rendered. Lien are of two types:

(i) Particular lien,

(ii) General lien.

(1) Particular lien.-A bailee has a particular lien when the following conditions are fulfilled:

(i) The bailee must have rendered some service in relation to the thing bailed and must be entitled to some remuneration for it which must not have been paid.

(ii) The service rendered by the bailee must be one involving the exercise of labour or skill in respect of the goods bailed, so as to confer an additional value on the articles.

(iii) The services must have been performed in full in accordance with the direction of the bailor, within the agreed time or a reasonable time.

(iv) There must not be an agreement to perform the service on credit.

(v) The goods must be in possession of the bailee. If possession is lost the lien is also lost.

(vi) There must not be a contract to the contrary.

If all the above mentioned conditions are satisfied, the bailee can exercise his right of particular lien until he is paid for his service.

The following points must also be noted in connection with the bailee's particular lien:

(a) The bailee retaining the article to enforce his lien cannot charge for keeping it,

(b) The bailee cannot exercise his lien for the non-payment of extra-ordinary expenses incurred in relation to the things bailed. He should sue for them.

Beaven v. Waters, (1828) 3 Car & P 520: The court observed that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to retain it until his demand is paid

Scarfe v. Morgan, (1838) 47 M&W 270 (283): Section 170 incorporates the common law principle that "if a man has article

delivered to him, on the improvement of which he has to bestow trouble and expenses and the artificer to whom the goods are delivered for the purpose of being worked up into, from, or the farrier by whose skill the animal is cured of a disease, or the

house-breaker by whose skill he is rendered manageable, have liens on the chattles in respect of his charges.

Hutton v. Car Maintenance Co., (1915) 1 Ch 621: This case the plaintiff company maintained the car of the defendant. Some maintenance expenses having become due, the plaintiff company took over the car into its possession and claimed lien for the expense. The court, however, rejected its claim because what it did was simply to maintain the car and not to improve it.

Chase v. Westmare, (1816) 15 M&S 180: Only such goods can be retained on which the bailee has bestowed trouble and expense. He cannot retain any other goods belonging to the bailor which are in his custody.

Hartley v. Hitchcock, (1816) 171 ER 512: "Lord Ellenbruogh" cited that the defendant after the repairs were completed, relinquished his possession, and could not afterwards detain for the amount of the repairs. This lien in a possessory right which continues only so long as the possessor holds the goods.

(2) General Lien.-A general lien is a right to retain the goods of another as a security for a general balance of payment and account. In simple words, this right entitled a person to retain possession of any goods belonging to another for any amount due to him whether in respect of those goods or any other goods. For example, if two loans have been taken against two securities from a banker and borrower repays one of these loans, the banker may retain both securities until his other loan is paid. Where the quantity of imported meat was stored with a warehouse keeper who by a general term of the trade had a general lien, it was held that he could retain the meat for his charges due in respect of other goods.

Define General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

Section 171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.-Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them, but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

Syndicate Bank v. Vijay Kumar, MANU/SC/0196/1992 : AIR 1992 SC 1066: In merchantable system, the bank has a general lien over all form of securities to negotiable instruments deposited by or on behalf of the customers in the ordinary course of the banking business. The bank has the liberty to adjust from the proceeds of the two FDRs towards the due to the bank and if there is any balance left that would belong to the depositor.

Smt. K.S. Nagolambika v. Corporation Bank, MANU/KA/0498/2000 : AIR 2000 Kant 201: Section 171 of the Act is clear and categoric that unless a contract to the contrary is established by the plaintiff, the bank's right of lien will have to be accepted.

Om Shankar Biyani v. Board of Trustees, Port of Calcutta, MANU/SC/0118/2002 : (2002) 3 SCC 168: The proportion that the bailee, who exercise a lien, is not entitled to charge real for storage of goods can never apply to a case were the lien is exercised for

non-payment of rent are storage charges.

The right of general lien is a privilege and is specially conferred by section 171 on certain kinds of bailee only. These are-

(1) Bankers.-A banker has a general lien on all goods, cash, cheques and securities deposited with him as banker by a customer, for any money due to him as a banker. Thus, where a customer has a credit balance in one account of the bank and at the same time he owes money to the bank on another account, the banker's general lien entitles him to refuse the customer to operate the account in which he has a credit balance till he clears the debt due to the Bank.

Davendra Kumar v. Chaudhary Gulab Singh, ILR (1946) Nag 210: In this case it was observed that where valuable and securities are deposited for a specific purpose e.g., for safe custody the banker has no general lien on them as the acceptance of the goods for a special purpose impliedly excludes general lien.

Merchantile Bank of India Ltd. v. Rochaldar Gidumal & Co., AIR 1926 Sind 226: A bank received some money of his customer with instruction to transmit it telegraphically to his own firm at other place, it was held that the bank could not retain it as was not given to it for the purpose of bailment.

Jagdishwar Reddy v. Manager, Andhra Bank, (1988) 1 Andh LT 605: Where a person obtained a loan on a pledge of gold ornaments to the lending bank and subsequently became a guarantor for another person's loan. He was allowed to claim his ornaments on paying-off his personal loan though the loan of another person guaranteed by him still subsisted.

Syndicate Bank v. Devendra Karkera, MANU/KA/0001/1994 : AIR 1994 Kant 1: The principle of general lien does not extend to a loan taken by the customer from another branch of the bank. A guarantor was allowed to take back his securities from the bank when the bank guarantee in respect of which they were deposited came to an end. The bank was not allowed to retain them for the loan of another company in which also the guarantor was a director.

State Bank of India v. Deepak Malviya, AIR 1993 All 165 (168): Section 171 of the Indian Contract Act and the general principles covering the Banker's lien specifically authorises the bank to retain the pledged goods such as ornaments claiming lien over them till the Bank's money is not cleared for the loan in connection with the other account for which a decree has already been passed in favour of the Bank.

(2) Factors.-A factor is an agent entrusted with the possession of goods in the ordinary course of his business for the purpose of sale. He has a general lien on the goods of his principal, if any money is due to him by his principal whether for advances made or for remuneration.

Factor means an agent entrusted with possession of goods for the purpose of selling them for his principal. He is given the possession of the goods in the ordinary course of his business for his balance of account against the principal.

E.H. Parakh v. King Emperor, AIR 1926 Oudh 202. It is necessary for the lien to arise that the goods should have been delivered to the factor in the course of business and in his capacity as a factor.

A factor who used to have various dealings with his principal was instructed by the principal to effect a policy of insurance on a ship. The principal sent the premium and the policy remained in the possession of the agent, who claimed lien for the money which was owing to him in his capacity as a factor.

(3) Wharfingers.-A wharfinger has a general lien on the goods as regards charges due for the use of wharf against the owner of the goods. A wharfingers is a person who keeps a wharf, a platform in a harbour on which goods are kept for purpose of loading or unloading ships. A wharfinger can retain all such goods until his charges are paid. A manufacturer possessing a wharf for receiving goods of his customers will not be entitled to general lien as a wharfinger.

(4) Attorneys of High Court.-An attorney or solicitor of a High Court has a general lien on all papers and documents belonging to his client which are in his possession in his professional capacity until the fee for his professional service and other cost incurred by him are paid. But if the solicitor refuses to act any more for the client, he is not entitled to any lien.

R.D. Saxena v. Balram Prasad Sharma, AIR 2000 SC 2912: The Supreme Court finally observed that looking from any angle, it cannot be said that the case papers entrusted by the client to his counsel are the goods in his hand upon which he can claim a retaining lien till his fee or other charge is incurred are not paid. Thus general lien envisaged under section 171 of the Contract Act is not available to Advocates in respect of the case papers entrusted by the client to him.

(5) Policy-brokers.-They can retain the policy of fire or marine insurance for their brokerage. His lien extends to any balance or any insurance account due to him from the person who employed him to effect the policy.

Distinction between Particular & General Lien

Explain the points of distinction between particular and general lien.

(1) The right of particular lien can be claimed by every bailee who has in accordance with the purpose of a bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed provided that there is no contract expressing a contrary intention on the other hand, the right of general lien can be claimed only by bankers, factors, wharfingers, attorneys of High Court and policy brokers.

(2) The right of particular lien can be claimed only in respect of goods upon which some labour or skill has been exercised by the bailee. The right of general lien, on the other hand, can be claimed in respect of any goods for any charge due in respect of other goods.

(3) Right of particularly lien can be successfully claimed if by the exercise of labour or skill, there has been some improvement of the goods but the same is not necessary in case of general lien.

Pledge (Sections 172-181)

Define pledge pawnor and pawnee

What are the essentials of pledge? Explain in brief.

Section 172. 'Pledge', 'pawnor' and 'pawnee' defined.—The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor is in this case called the 'pawnor'. The bailee is called 'pawnee'.

Under section 172 of the Contract Act, bailment of goods as security for payment of a debt performance by promise in called pledge i.e., delivery of goods by one person to another under contract as security for payment of a debt or performance of a promise is a pledge. In other words, a pledge is the delivery of goods by the pledger to the pledgee by way of security upon a contract that they shall when the debt is paid or promise is performed, be returned or otherwise disposed of according to the direction of the pledgee. Thus as appears from the definition of the pledge under section 172, there are following three essential ingredients of a pledge—

- (i) There must be a bailment of goods as defined in section 148 of the Contract Act that is delivery of goods,
- (ii) The bailment must be by way of security,
- (iii) The security must be for payment of a debt or performance of a promise.

(1) Delivery of Possession.—According to Ramaswami and Mudholkar it is observed that in all cases of pledge, an effective change of possession is absolutely necessary. The only exception could be in favour of a bill of lading. If the pledger has goods in his physical possession he could effect the pledge by actual delivery.

Canara Industrial and Banking Syndicate Ltd. v. Ram Chandra, AIR 1968 Mys 133: A pledge being a bailment of goods as security for payment of a debt, the pledgee will have the same remedies as the owner of the goods would have against a third person for deprivation of the said goods on injury to them.

Suneel Kumar Gupta v. Punjab & Sind Bank, AIR 2006 Utr 26: Delivery of the chattel pawned is a necessary element in the making of a pawn. The property pledged should be delivered to the pawnee. Pledge is the delivery of the possession of the pledged property. The delivery of possession may either be actual or constructive.

Reeves v. Copper, (1933) Bing NC 136: In this case, the captain of the ship pledged his chronometer with his employer, the ownership. The captain was allowed to keep the chronometer and to use it for the purpose of a voyage later on the captain pledged it again with another person. It was held that the first pledge was valid as it was a case of constructive delivery.

New India Assurance Co. Ltd. v. Lakka Vijaya Gopala Reddy, MANU/AP/0492/2003 : AIR 2003 AP 465: In this case, loan was taken from the bank for buying mechanised fishing boat which was hypothecated to Bank and was also insured for ensuring security in the said loan. The said fishing boat was subsequently destroyed. The Bank sued the insurance company for compensation. It was held that there is no privity of contract between the bank and the insurance

company and that the bank being not a party to the insurance policy cannot sue the insurance company for compensation.

(2) In pursuance of Contract.-Pledge is a conveyance pursuant to a contract and it is essential to a valid pledge that delivery of the chattel shall be made by the pledger to the pledgee in pursuance of the contract of pledge.

Define the right of pawnee to retain the goods.

Section 173. Pawnee's right of retainer.-The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interests of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Section 174. Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.-The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Thus the Pawnee has the right to retain the goods pledged until his dues are paid. He has the right to retain the goods pledged, not only for payment of the debt or performance of the promise, but for the interest due on the debt and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged. Thus this right may be termed as the pawnee's right of particular lien.

Bank of Chittoor v. Narasimhulu Naidu, MANU/AP/0113/1966 : AIR 1966 AP 163: A cinema projector and accessories were pledged with a bank. The bank allowed the property to remain with the pledgers, since they formed the equipment of a running cinema, subsequently, the pledgers said the machinery.

The court held that the sale was subject to the pledge. There was a constructive delivery or delivery by attornment to the bank.

Smt. Aratibala Mohanty v. S.B.I., MANU/OR/0063/1991 : AIR 1991 Ori 260: The petitioner had taken the loan on the pledge agreement. On account of order of attachment from the court and seizure of the property, the bank which had the obligation to deliver back the possession of the goods when the pawnee exercised her right of redemption did not discharge that obligation. The Division Bench of the Orissa High Court held that the bank as the pawnee having refused to perform its obligation of redelivering the goods on debts being satisfied cannot claim any interest for the said period and the observations to the effect of the pawnee is not in position to re-deliver the goods, he cannot have both the payment of debt and also the goods would apply.

Section 174 provides that when the pawnee lends money to the same debtor after the date of the pledge without any further security, it shall be presumed that the right of retainer over the pledged goods extends even to subsequent advances. This presumption can be rebutted only by a contract to the contrary. It will be noticed that although a pawnee has a particular lien only but this section allows him to track his subsequent advances to the original debt, in the absence of any agreement to the contrary.

Branch Manager, State Bank of Mysore v. K. Amarnath, (2003) 2 Kar LJ 31: Where the contract provided that the hypothecatee would have the power to take possession of and sell hypothecated goods without intervention of the court. It was held that a dispute resulting from the exercise of this power was outside the scope of determination in a writ jurisdiction.

Central Bank of India v. Siriguppa Sugars & Chemicals Ltd., MANU/SC/3367/2007 : AIR 2007 SC 2804: A sugar manufacturing company had pledged its stock of sugar with the lending Bank. It was held that the rights of the bank over the pawned sugar had precedence over claims of the cane commissioner for payment to cane growers and claims of workmen. In the absence of winding-up of the company, their claims ranked as those of unsecured creditors.

Explain in brief the rights of pawnee.

Section 175. Pawnee's right as to extraordinary expenses incurred.-The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Section 176. Pawnee's right where pawnor makes default.-If the pawnor makes default in payment of the debt, or performance; at the stipulated time or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; as he may sell the things pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Syndicate Bank v. Mahalaxmi Ginning Factory, MANU/KA/0279/2004 : AIR 2005 Kant 5: If an agreement of term loan and hypothecation with a bank, there was no provision empowering the bank to debit any amount by way of xerox charges or legal fees. The court did not permit the bank to debit such amounts.

Section 176. Provides for pawnee's right where pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged. In such a option the pawnee has the following options:

(a) He may bring a suit against the pawnor upon the debt or promise and retain the goods pledged as a collateral security,

(b) He may sell the goods pledged on giving the pawnor reasonable notice of the sale.

State Bank of India v. Neela Ashok Naik, MANU/MH/0236/2000 : AIR 2000 Bom 151: This section makes it clear that it is the discretion of the pawnee either to sell the goods in case the pawnor makes default as bring a suit for recovery of the debt and retain the goods pledged as collateral security.

Central Bank of India v. Siriguppa Sugars & Chemicals Ltd., MANU/SC/3367/2007 : AIR 2007 SC 2804: Thus, it is obvious that the pawnee has been given a right to sell the goods after giving a reasonable notice to the pawnor. But in case, he does not himself sell the property but allows his creditor to sell it and if any loss is sustained, the pawnor will not be held liable to pay the balance.

Section 177. Defaulting pawnor's right to redeem.-If the time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them, but he must, in that case, pay, in addition, any expenses which have arisen from his default.

A pawnor who defaults in payment of the debt amount at the stipulated date, has a right to redeem the debt at any subsequent time before the actual sale of goods pledged. Thus an agreement that the pledge should become irredeemable, if it is not redeemed within a certain time, would be invalid of course, the pawnor redeeming after the expiry of the specified time must pay to the pawnee, in addition, any expenses which have arisen after his default.

Hulas Kanwar v. Allahabad Bank, MANU/WB/0159/1958 : AIR 1958 Cal 644: The language of sections 176 and 177 of the Contract Act seems to suggest that those two sections apply in terms only to cases where a time is stipulated in the agreement of hypothecation for the payment of the debt or the performance of the promise. Sections 176, 177 equally apply to cases where a time for the payment of the debt has been fixed as the original agreement of pledge or hypothecation and to cases where no such time is stipulated.

Define merchantile agent and explain also the pledge by him.

178. Pledge by merchantile agent.-Where a merchantile agent is, with the consent of the owner, in possession of goods or the document of title to goods, any pledge made by him, when acting in the ordinary course of business of a merchantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.-In this section, the expression 'merchantile agent' and 'documents of title' shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930 (3 of 1930).

A merchantile agent who is, with the consent of the owner, in possession of the goods or the documents of title to goods (e.g., railway receipt or bill of loading) can make a valid pledge of the goods while acting in the ordinary course of business of a merchantile agent. Such a pledge will be valid even if the agent had no actual authority to pledge provided that the pawnee acts in good faith.

Al Cheung v. Ah Wain, AIR 1938 Rang 243: 176 IC 708: This section aims at protecting those persons who in good faith deal with persons whom they know to be merchantile agents, but of the details of whose agency they are not and cannot be expected to be aware.

Section 2(9) Sale of Goods Act.-Merchantile agent means an agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods.

Sharadin v. Gokulchand, AIR 1931 Lah 526: The court interpreted 'possession' appearing in section 178 as juridical possession as distinguished from mere physical possession or bare custody. It has been held that a servant or a relation entrusted by the owner with the custody of goods during his absence cannot be said to be in possession thereof so as to entitle to make a valid pledge thereof.

Section 178A. Pledge by person in possession under voidable contract.-When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or section 19A, but the contract has not been rescinded at the time of pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

Section 178A provides that if the pawnor has obtained the possession of the goods under a contract which is voidable under sections 19 or 19A, Contract Act, then a pledge by him would be valid if the pledgee had no notice of the want of defect of title and that the contract had not been rescinded at the time of the pledge.

Example.-A purchases a ring from B exercising coercion and pawns it with C before the contract is rescinded by B, the pledge is valid. C will get a good title to the ring and B can only claim damages from A.

Visalakshi Ammal v. Coimbatore Janopakara Nidhi Ltd., MANU/TN/0275/1941 : AIR 1942 Mad 299: However, in order to come within the scope of section 178A, a person seeking relief thereunder must establish that the pawnor had a legal title on the date of the pledge though that title is defective either under section 19 and 19A of the Contract Act. The essence of that provision is that the pawnor must have had a title to the goods pledged on the date of the pledge.

Section 179. Pledge where pawnor has only a limited interest.-Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Section 179 must be read with section 170. Because all that section 179 says is that a person may pledge his limited interest in the goods when he has a limited interest only. It is an enabling provision which clearly provides that the pledge in the circumstances mentioned therein is valid only to the extent of the interest. Where no such interest exists a valid pledge will not take place under section 179.

For example.-A delivers a suit length to B, the tailor master, for making a suit and agrees to pay Rs. 1,500 as sewing charges. B pledges the suit with C for Rs. 3,000. The pledge is valid to the extent of B's interest in the suit, namely Rs. 1,500 (Sewing Charges). A can therefore, recover the suit only on paying Rs. 1500 to C the pledgee.

Suits by Bailees or Bailors against Wrong-doers

Section 180. Suit by bailor or bailee against wrong-doer.-If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

The section 180 enables a bailee to sue any person who has wrongfully deprived him of the use or possession of the goods bailed or has done them any injury. The bailees' rights and remedies against the wrongdoer are just the same as those of the

owner. An action, may, therefore be brought by the bailee or the bailor.

Purshottam Das v. Union of India, MANU/UP/0171/1967 : AIR 1967 All 549: Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their responsive interests.

Section 181. Apportionment of relief or compensation obtained by such suits.-Whatever is obtained by way of relief or compensation in such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER XI

AGENCY

(Sections 182-238)

Appointment and Authority of Agents

Define agency.

Section 182. 'Agent' and 'principal' defined.-An agent is a person employed to do any act for another, or to represent another in dealing with third person. The person for whom such act is done, or who is so represented, is called the 'principal'.

The contract which creates the relationship of 'principal' and agent is called an agency. Thus where A appoints B to buy ten bags of sugar on his behalf, A is the principal, B is the agent and the contract between the two is agency. If in pursuance of the contract of agency, the agent purchases the bags of sugar from C a wholesale dealer in sugar on credit, then in the eye of law the 'principal' and the wholesale dealer are brought into direct contractual relations and the contract of purchase is enforceable both by and against the principal.

Section 182 of this Act defines an agent as a person employed to do any act for another to represent another in dealing with third persons.

Motilal Chanoalal Vaish v. Golden Tobacco Co., MANU/MP/0092/1957 : AIR 1957 MP 223: The rule as to agency is expressed in the Maxim 'qui facit per alium, facit per se'. It is founded on a contract either express or implied by which one of the parties confides to the other management of some business to be transacted in his name on his account and by which the other assumes to do the business and render an account of it.

Agency is often created by actual authority given by principal to the agent on principal's ratification of contract entered into by the agent on his behalf but without authority.

According to Anson's law of contract: Although a general rule one man cannot by contract with another confer or rights to impose liabilities upon a third party yet he may represent another, as being employed by him, for the purpose of bringing him into legal relation with a third party.

Krishna v. Ganapathi, AIR 1953 Mad 648: The concept of 'Agency' has been explained by Ramaswami J. of the Madras High Court. In legal phraseology, every person who acts for another is not an agent. A domestic servant renders to his master a personal service, a person may till another field or lends his flocks as work in his shop or factory or mine or may be employed upon his roads or ways one may act for another in aiding in the performance of his legal or contractual obligation of third persons.

Loon Karan v. John & Co., MANU/UP/0102/1967 : AIR 1967 All 308: Dhawan J. of the Allahabad High Court expressed that, "Agency depends on true nature of relationship. It was held in several decisions that the fact that the parties have called their relationship an agency is not conclusive if the incidence of this relationship, as disclosed by evidence does not justify a finding of agency, and that the court must examine the true nature of the relationship and the functions and responsibilities of the alleged agent.

According to Pollock & Mulla: The list of determining agency is whether the person is purporting to enter into the transaction on behalf of the principal or act.

Illustrations

(i) Certain millers were appointed licensee by the Government to buy wheat at a fixed price and to sell the same to particular persons at a price fixed by the Government. The said millers received commission for their labour. Did the relationship of principal and agent exist between the Government and the said millers?

They cannot be said to be the agents of Government for the representative character and derivative authority which is essential to absent here.

(ii) P represents to Q that he (P) is acting as agent for R. Relying on that representation Q delivers goods to P as buyer. Is there a valid contract between P and Q. Does any property pass to P and can he (P) make a valid contract

For a valid contract between P and Q it is essential that P must have derivating authority of R. If there is not such authority the contract is not valid. The title to goods shall not pass to P and that he cannot make a valid pledge of goods.

Define the capacity of person who may employ an agent.

183. Who may employ agent.—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Under section 183 of the Contract Act, any person who is competent to contract and who is of sound mind may appoint an agent. The appointment may be expressed in writing or it may be oral. Under this section a person who is sui juris has a right to appoint an agent for any purpose whatsoever, but this rule is subject to certain well-known exceptions as when the act to be performed is personal in character or is annexed to a public office or to an office involving fiduciary obligation.

T.C. Mathai v. District and Sessions Judge, MANU/SC/0224/1999 : AIR 1999 SC 1385: Every person who in sui genris has a right to appoint an agent for any purpose whatsoever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right. This rule is subject to certain well-known exceptions. As per the exceptions mentioned by the Supreme Court in that case, a person's right to appoint an agent does not extend to the following acts:

- (1) Where the act to be preformed is personal in character, or
- (2) Where the act to be performed is annexed to a public office, or
- (3) Where the act to be performed is annexed to an office involving any fiduciary obligation, or
- (4) Where the law requires that a particular act should be done by a party in person.

Shephard v. Cartwright, (1953) 1 Ch 728: "An infant cannot appoint an agent to act for him neither by means of a power-of-attorney, nor by any other means. If he purports to appoint an agent, not only is the appointment itself void, but everything done by the agent on behalf of the infant is also void and incapable of ratification."

An infant has not sufficient discretion to choose on agent to act for him. He is all too likely to choose a wrong man and so the law declares him to be incapable of choosing agent at all.

Mahendra Pratap Singh v. Padam Kumar Devi, AIR 1993 All 182: Since the defendant is weak, mentally infirm and cannot comprehend for herself, the power-of-attorney which authorised to act as agent of the defendant had been exhausted because of the defendant's incapacity.

Discuss the competency of agent.

Section 184. "Who may be an agent".—As between the principal and third person any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to responsible to his principle according to the provisions in that behalf herein contained.

The agent need not be competent to contract. Section 184 lays down very clearly that as between the principal and third person any person may become an agent. Ordinarily, an agent incurs no personal liability while contracting for his principal and, therefore, it is not necessary that he should be competent to contract. Thus a person may contract through a minor agent but the minor will not be responsible to his principal.

Gopimal Durga Das v. Jain Bank of India Ltd., Lahore, AIR 1918 Lah 269: It was held that (i) as a minor can act as an agent under section 184, Contract Act, the fact that at the time of the application the member was not sui juris did not vitiate the contract between the Bank and the firm and that the firm was therefore liable on the shares, (ii) that as the minor did not give notice within reasonable time after attaining majority of her repudiation, he was also equally liable.

What consideration is required to form an agency?

Section 185. Consideration not necessary.-No consideration is necessary to create an agency.

Under the provisions of this section; No consideration is necessary to create an agency. In all cases of general agency, the relation may be generally fiduciary, but in other kinds of agencies, the relation may vary with the confidence, which the principal chooses to repose in the agent. It may also be noted upon the power which the agent exercises over the subject-matter under the terms of the contract of agency or by virtue of the incident of law and usage of the business, which the relationship implies. Thus the fiduciary element in agency, though the key to much of the law governing this relation, is not the essential element in the relation.

Smt. Chandra Kantaben J. Modi and Narendra Jayantilal Modi v. Vadilal Bapalal Modi, MANU/SC/0506/1989 : AIR 1989 SC 1269: The Supreme Court clarified the fiduciary position of the agent vis-a-vis his principal. Delivering the judgment Lalit Mohan Sharma J. observed it is well-settled that the possession of the agent is the possession of the principal and in view of the fiduciary relation agent cannot be permitted to claim his own possession.

Section 186. Agent's authority may be expressed or implied.-The authority of an agent may be expressed or implied.

Section 187. Definition of express or implied authority.-An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and the things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purpose of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

The relationship of principal and agent need not be expressly constituted and can be brought about by implication of a law on a particular situation arising from the necessity of a case.

Agency need not be created by written document and can be inferred from the circumstances and conduct of the parties.

The scope of express authority is worked out by construction of the words used in the document. For example, where a principal, while going abroad, authorised his agent and partner to carry on the business, and his wife to accept bills on his behalf for the personal business, he was held not bound when his wife accepted bills for the business, which the agent was conducting and which was different from his personal business. An authority is said to be express when it is given by words spoken or written. An implied authority is one which can be inferred from the circumstances of the case.

Bank of Bengal v. Ramanathan, AIR 1915 PC 121: While interpreting the authorization of an agent in money-lending business, the Privy Council applied the following canon of construction-"where an act purporting to be done under power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication.

The distinction between express or implied authority is not fundamental, but depends merely on whether the authority is limited by words or by conduct. If P tells A that he is to act as manager, this is really a compendious way of stating that he is to do all the acts as manager would ordinarily do. Those acts might well be termed as express authority.

Discuss the extent of agent's authority.

Section 188. Extent of agent's authority.-An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or

usually done in the course of conducting such business.

Illustrations

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

Under section 188 of the Contract Act, the authority of every agent whether express or implied is confined within the limits of the powers of his principal and an agent of a corporation or incorporated company cannot have any authority express or implied to do any act on behalf of the corporation or company which is ultra vires:

Robinson v. Mollet, (1874) LR 7 HL 802: 'R authorised a broker M to purchase for him 50 tons of tallow. M supplied his own tallow as there was a custom in his trade to buy large quantities of tallow in his own name and then to allocate it to his principals.

The House of Lords held that the custom to be unreasonable. It made M, a wholesaler rather than an agent. It also created a conflict between his duty to the principal and his personal interest.

Where a principal gives an express authority to do a particular act or class of acts on his behalf the principal is bound as against third person by every act done by the agent who is so expressly authorised, which is necessary for the proper execution of the business, even though the express authority is unknown to the third person.

Section 189. Agent's authority in an emergency.-An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case under similar circumstances.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C, at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack, without spoiling.

It is a liability of an agent in general in an emergency to do all works for protecting his principal from loss as would be done by a person of ordinary prudence in regard to his own case. Under this section when an agent acts in emergency what is to be considered is whether he acted as an average prudent man and has taken reasonable care.

The principal will not normally be liable for the unauthorised criminal act of the agent or for the other acts done by him in excess of his authority. When an agent having no authority to borrow money does so and such borrowing is neither justified by necessity nor it is in the usual course of business, the principal is not liable.

Kinds of Agents

Explain in brief kinds of agents.

Explain in brief Del credere agent.

I. From the point of view of the extent of their authority agents may be classified into-

(a) General agent.-A general agent is one who is employed to do all acts connected with a particular business or employment e.g., a manager of a firm. He can bind the principal by doing any thing which falls within the ordinary scope of that business. Whether he is actually authorised for any particular act or not, is immaterial, provided that third party acts bona fide.

(b) Special agent.-A special agent is one who is employed to do some particular act or represent his principal in some particular transactions e.g., an agent employed to sell a motor car. If the special agent does anything outside his

authority, the principal is not bound by it and third parties are not entitled to assume that the agent has unlimited powers.

(c) Universal agent.-A universal agent is said to be one where authority is unlimited i.e., who is authorised to do all the acts which the principal can lawfully do and can delegate.

II. From the point of view of the nature of work performed by them agents may be classified into-

(a) Factor.-A factor is a merchantile agent to whom goods are entrusted for sale. He enjoys wide discretionary powers in relation to the sale of goods. A factor is the agent who is entrusted with the possession and contract of the goods to be said by him for his principal. According to Anson- He has possession of the goods, authority to sell them in his own name and a general discretion as to this sale. He may sell on the usual term of credit may receive the price and give a good discharge to the buyer.

(b) Broker.-He is one who is employed to make contracts for the purchase and sale of goods. He is not entrusted with the possession of goods. He simply acts as a connecting link and brings the two parties together to bargain and if the circumstances materialises he becomes entitled to his commission called brokerage. He makes contracts in the name of his principal. Thus, a broker is an agent primarily employed to negotiable a contract between two parties. Where he is broker for sale he has no possession of the goods to be sold.

(c) Del Credere Agent.-He is one who in consideration of an extra-commission guarantee his principal that the third persons with whom he enters into contracts on behalf of the principal shall perform their financial obligation that is, if the buyer does not pay, he will pay. Thus he occupies the position of a surety as well as of an agent.

Couturie's v. Hastie, (1852) 8 Exch 40: "The defendants acting or del credere agents sold the plaintiff's goods which were supposed to be on a voyage but which unknown to the parties had already been sold by the captain owing to the damage by heat. The buyer repudiated the contract and, therefore, the agents were sued for the buyer's failure to perform."

The question was "whether the defendants are responsible by reason of their changing a del credere commission", though they have not guaranteed by writing. Thus is main object of the reward being given to them. Keeping this in view the court held that a del credere agency is not a contract of guarantee even if it may terminate in a liability to pay the debt of another because the agent has a personal interest in the transaction and therefore writing is not necessary.

(d) Commission agent.-A commission agent is a merchantile agent who buys or sells goods for his principal on the best possible terms in his own name and who receives commission for his labours. He may have possession of goods or not.

(e) Pakka Adatia & Kachha Adatia.-Pakka Adatia in an agent of his constituent only upto a certain point only for the purpose of ascertaining and giving a correct quotation of the price. But thereafter when the transaction takes place, he cease to be an agent and assumes towards his constituent the character of a principal, and the transaction must be regarded as a contract between principal and principal.

Sub-agents (Sections 190-195)

Who may be sub-agent? Explain.

Section 190. When agent cannot delegate.-An agent cannot lawfully employ to another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a

sub-agent may, or, from the nature of the agency, a sub-agent must be employed.

Section 191. 'Sub-agent' defined.-A 'sub-agent' is a person employed by and acting under the control of the original agent in the business of the agency.

Sub-agent is defined in section 191 as 'a person employed by and acting under the control of the original agent in the business of the agency.'

Union of India v. Mohd. Nizam, MANU/SC/0588/1979 : AIR 1980 SC 431: Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use and is responsible to the principal for the negligence and other breaches of duty of sub-agent in the course of his employment. The principle of law is based on this maxim 'qui per alium facit per seipsum facere videtur' which means 'he who does an act through another is deemed in law to do it himself.

Explain-Who can appoint sub-agent and who is responsible for the acts of sub-agent?

Section 192. Representation of principal by sub-agent properly appointed.-Where a sub-agent is properly appointed, the principal is, so far as regards third person, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent.-The agent is responsible to the principal for the acts of the sub-agent.

Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use, and responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment.

Sub-agent's responsibility.-The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong.

Summon Singh v. N.C. Bank of New York, AIR 1952 Punj 172: The plaintiff in a foreign country appointed to N.C. Bank to deliver a sum of money to one Pritam Singh of Jullundur whose address was given. The bank instructed its Bombay Branch accordingly. The Bombay branch appointed the Punjab National Bank which delivered the money to a wrong person.

The plaintiff's action against either bank failed. The PNB was held not on the principle that a sub-agent is not liable to the principal except when he is guilty of fraud or wilful wrong. The wrong delivery was due only to negligence. The N.C. Bank had exempted itself from the consequences of wrong delivery. A sub-agent is, however, bound by all the duties of an ordinary agent.

Section 193. Agent's responsibility for sub-agent appointed wrong authority.-Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

The principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal. Delegation is improper when it is not authorised, that is. When it is not within any of the recognised exceptions. The effect is that the principal is not bound by the appointment.

Section 194. Relation between principal and person duly appointed by agent to act in business of agent.-Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the monies due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

Section 195. Agent's duty in naming such person.-In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be on sea worthy and is lost. B is not, but the surveyor is responsible.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

The true test to determine whether the person appointed by an agent authorised in that behalf to perform part of the business of agency is a substituted agent of the principal or the sub-agent of the agent is to see if there is a privity of contact between the principal and the person so appointed, and the test to be applied in the same whether the case falls within section 194 or whether the person so appointed is the nominee of the principal although there is a difference in the obligation undertaken by the agent, for section 195 applies to a case falling within the section 195.

A sub-agent has to be distinguished from a substituted agent-Sections 194 and 195 contain special provision about substituted agents. As per section 194 when an agent has an express or implied authority of his principal to name a person to act for him and the agent has accordingly named a person, such person is not a sub-agent, but he becomes an agent for the principal in respect of the business which is entrusted to him.

Ratification (sections 196-200)

Define ratification and what are the factors responsible for ratification.

By ratification we mean act which the principal confirms unauthorised acts of the agent. That is to say, even if the agent enters into a contract, without the authority, consent or knowledge of the principal may if he likes ratify and thereby accept the benefits and obligations arising out of such a contract.

Section 196. Right of person as to acts for him without his authority. Effect of ratification.-Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Mulamchand v. State of Madhya Pradesh, MANU/SC/0009/1968 : AIR 1968 SC 1218: The following conditions are necessary before another can ratify an act of a person namely:-

- (1) An act must have been done by one person on behalf the other person (the supposed principal) and not on account of the agent himself.
- (2) The act must not be void act. There is no question of ratification of a void contract.
- (3) The act must have been done without the knowledge or authority of that other person who may elect to ratify or to disown such act. If he ratifies it the same effects will follow as if it had been performed by his authority. Such ratification may be express or implied from the conduct.
- (4) What is essential under section 196 is an effective ratification. Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies.

Hukumchand Insurance Co. Ltd. v. Bank of Baroda, AIR 1977 Karn 204: When an agent acting for and on behalf of another stipulates a benefit for the principal under a contract and the principal without demur avails himself of the benefit, the law implies a ratification of that contract on the part of the principal.

Section 197. Ratification may be expressed or implied.-Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account, B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

The agent must contract as agent for a principal who is in contemplation, and who must also be in existence at the time for such things as the principal can and lawfully may do.

Lord Lindley.-The doctrine of ratification as hitherto applied in this country to contract has always, I believe, in fact given effect in substance to the real intentions of both contracting parties at the time of the contract as shown by their language or contract. It has never yet been extended to other cases.

State of Madras v. Saifuddein Abdul Hussain, MANU/TN/0051/1963 : AIR 1963 Mad 140: It is the duty of a person entering into contract with officers of the government acting on behalf of the government to enquire and ascertain whether they had the authority and power and satisfy himself. A contract for supply of goods to government, entered into on behalf of the government by an officer or a person not authorised by the rule is not binding on the government, even though the person who supplied the goods on such order might have been induced to believe that he will be paid.

Section 198. Knowledge requisite for valid ratification.-No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

In order to binding adoption of acts a priori unauthorised these conditions must exist-

- (i) the act must have been done for and in the name of the supposed principal, and
- (ii) there must be full knowledge of what these acts were or such as unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts whatever they are.

Section 199. Effect of ratifying unauthorized act forming part of a transaction.-A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Thus if a person ratifies an act which is a part of a transaction it will be deemed as if the whole transaction has been ratified. Thus a person cannot choose to ratify part of a transaction and repudiate the terminating part.

Section 200. Ratification of unauthorized act cannot injure third person-An act done by one person on behalf of another, without such other person's authority, which, if done with authority would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) A, not having authorized thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B from C who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Halsbury's law of England.-The rule is thus stated - "A ratification does not relate back when persons other than the contracting party have acquired interest prior to rectification."

State of Uttar Pradesh v. Murari Lal, MANU/SC/0028/1971 : (1971) 2 SCC 449: Only lawful acts are open to ratification. An act which is void from the very beginning cannot be ratified. The ratification must be in relation to a transaction which may be valid in itself and not illegal. Where money was entrusted to a person for investment and he put it to his own use, it was held by the privy council that the doctrine of ratification could not be used to validate this breach of fiduciary relationship.

According to Anson.-"The principal who accepts the contract made on his behalf by one whom he thereby undertakes to regard as his agent, may signify his acceptance by words or conduct. In the absence of an express avowal however, the

ratification must be founded on a full knowledge of the facts and the principal must have had the option whether to accept or to refuse the contract.

Revocation of Authority (Sections 201-210)

When an agent can be terminated and what are the modes of revocation?

Section 201. Termination of agency.-An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

This section provides for the following modes of revocation-

- (a) Termination by Act of the parties:
 - (i) Agreement,
 - (ii) Revocation by the principal,
 - (iii) Renunciation by the agent.
- (B) By operation of Law:
 - (i) Completion of the business,
 - (ii) Expiry of time,
 - (iii) Death of principal or agent,
 - (iv) Insanity of principal or agent,
 - (v) Insolvency of the principal,
 - (vi) Destruction of the subject-matter,
 - (vii) Dissolution of a company,
 - (viii) Principal or agent becomes alien enemy.

Section 202. Termination of agency, where agent has an interest in subject-matter.-Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

- (a) A gives authority to sell to B, A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor it be terminated by his insanity or death.
- (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

Corporation Bank, Bangalore v. Lalitha H Halla, MANU/KA/0019/1994 : AIR 1994 Kant 133: A power-of-attorney executed in favour of an agent recording or recognising an interest of the Agent/Attorney in the property which is the subject-matter of the agency cannot be revoked or terminated, even if the instrument does not state specifically that it is irrevocable, as then it would be a power coupled with an interest but a power-of-attorney simplicitor which merely authorized an agent to do certain acts in the name or on behalf of the executant at any time in spite of the instrument that power-of-attorney revoked or cancelled by the executant at any time in spite of the instrument stating that the power-of-attorney is irrevocable.

Discuss the power of principal to revoke the agent's authority.

Section 203. When principal may revoke agent's authority.-The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Section 207. Revocation and renunciation may be expressed or implied.-Revocation or renunciation may be expressed or may be implied in the conduct of that principal or agent respectively.

Illustration

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

Southern Roadways Ltd., Madurai v. S.M. Krishnan, MANU/SC/0124/1990 : AIR 1990 SC 673: The principal has right to carry on business as usual after the removal of his agent. The courts are rarely willing to imply a term fettering such freedom of the principal unless there is some agreement to the contrary. The agreement between the parties in this case does not confer right on the respondent to continue in possession of the suit premises even after termination of agency on the contrary, it provides that respondent could be removed at any time without notice and after removal the company could carry on its business as usual.

The agent acquires no interest in the property of the principal and he cannot, therefore, non-suit the principal on the possessory title as agent.

Section 204. Revocation where authority has been partly exercised.-The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) A authorizes B to buy 1,000 bales of cotton on account of A and to pay for it out of A's money remaining in B's hand. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

Hariprasad Singh v. Kesho Prasad Singh, MANU/BH/0181/1924 : AIR 1925 Pat 68: When the agent carries on business even after his authority has been revoked by the principal the latter cannot recover profits, if any made by the agent in that business. The agent cannot have any claim to remuneration for a period after the revocation.

S.R.M.S.T. Narayan Chettiar v. Kaleswaran Mills Ltd., MANU/TN/0211/1952 : AIR 1952 Mad 515: The power to revoke an authority gives to an agent after the authority has been partially exercised has been recognised by section 204, but the revocation cannot have effect of invalidating acts and obligations already done in the exercise of that authority as an agent. Section 204 preserves the validity of the acts and obligations made prior to the revocation. The section makes revocation effective only in respect of future acts.

Section 205. Compensation for revocation by principal, or renunciation by agent.-Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

206. Notice of revocation or renunciation.-Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Where an agent who has entered into a contract in his own name for the purchase of goods deliverable at a future date, rescinds the contract of agency for sufficient cause before the period of termination, the principal is entitled to credit for the

price of the goods on the date of business is terminated.

The word 'such' means 'of the kind' or 'of the like kind'. The word 'such' always refers to something else and it generally and naturally refers to its last antecedent where an agency has been created for a fixed period, compensation would have to be paid for its premature termination, if the termination is without sufficient cause. Thus no compensation is payable in the following cases:

- (i) Where the agency has not been created for any definite period.
- (ii) Where, though created for a specified length of time, reasonable. Notice for its termination has been given on the termination is otherwise based upon a sufficient cause.

When does agent's authority termination takes effect?

Section 208. When termination of agent's authority takes effect as to agent, and as to third persons.-The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Explain with the help of illustrations.

Illustrations

(a) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards by letter, revokes B's authority. B after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter revokes his authority to sell, and directs B to send the cotton to Madras. B after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his Will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

P directs Q to sell electric goods for him and agrees to pay Q five per cent commission on the sale. P afterwards, by a letter revokes Q's authority. Q, after the letter has been sent but before he receives it sells the goods worth Rs. 5,000 and claims five per cent commission on it. P pleads that Q's authority as his agent was terminated and hence he (Q) is not entitled for any commission will Q succeed?

According to section 208 the termination of the authority of an agent, does not, as regards the agent take effect before it comes known to him. Therefore the termination of authority of or did not become effective until Q received it. P is therefore liable to pay five per cent commission to Q. This is also clear from Illustration (a) to section 208 given above.

Mohindranath v. Kali Prasad, MANU/WB/0082/1929 : AIR 1930 Cal 265: If the agent is aware of the revocation and the third persons will be bound by this revocation only when they come to know of it. If they are ignorant of it and contract with the agent, the revocation will not affect them. It is, however, not necessary that the notice to the third parties must always be express. It will be sufficient if the revocation comes to the knowledge of the third party. But the onus of proving that the third party had the knowledge of the revocation will be on the principal.

The revocation of the authority of an agent may take effect insofar as third parties are concerned only when it is made known to him. Where a person acted as an agent in series of transaction, unless the authority is expressly revoked to the knowledge of other party to the contract, the agent would be presumed to have acted as such in subsequent transaction with that party.

Section 209. Agent's duty on termination an agency by principal's death or insanity.-When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late

principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

The section provides that when agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal. All reasonable steps for the protection and preservation of the interests entrusted to him.

When does the sub-agent's authority terminates?

Section 210. Termination of sub-agent's authority.-The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Section 210 provides that the termination of an agent's authority amounts to termination of all sub-agents appointed by him.

Agent's Duty to Principal (Sections 211-221)

What are the duties of agent in conducting principal's business?

Section 211. Agent's duty in conducting principal's business.-An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it.

Illustrations

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest him from time-to-time, at interest, the monies which may be in hand, on its to make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

Firm Munshilal Hariom Raj Nands v. Bankey Lal Hari Lal, MANU/UP/0107/1973 : AIR 1973 All 302: In this case the defendants placed an order for supply of Arhar at the prevailing market rate with the plaintiffs, the commission agents. The plaintiff were to receive a fixed commission. They purchased it for the defendants and sent a part of it by rail. The defendants accepted it but refused to take the remaining quantity of Arhar. Consequently, the plaintiff resold the remaining quantity and claimed the loss suffered by them on resale. The High Court observed:

Section 211 only say that an agent is bound to conduct the business of his principal according to the directions of the latter, or in the absence of any such direction, according to the customs which prevails in doing business of the same kind.

Lilley v. Doubleday, (1881) 7 QBD 510: "An agent was instructed to

ware-house in principal's goods at a particular place. He placed a part of them at a different warehouse which was equally safe. But the goods were destroyed without negligence.

The agent was held liable for the loss. Any disobedience of or departure from, the instructions makes the agent, absolutely liable for the loss.

An agent is also under a duty to maintain confidence, secrecy and non-disclosure of any sensitive information about the affairs of his principal. A banker may be liable if the state of his customer's account is leaked, except where the disclosure is under compulsion of law, e.g., duty to obey an order under Banker's Books Evidence Act, or under higher duty owed to State or public institution which supersedes lower duty or under any statement in a formal claim or with customer's permission.

Section 212. Skill and diligence required from agent.-An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business unless the principal has notice of this want of skill.

The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Illustrations

(a) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequences of not receiving the money, becomes insolvent. B is liable for the money and interest, from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss as, e.g., by variation of rate of exchange but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B at the time of such sale is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequences of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time of ship arrived, but not any profit he might have made by the subsequent rise.

State Bank of Indore v. National Textile Corporation, (2004) 4 MP LJ 214: A bank was instructed by the plaintiff to collect a certain amount on his behalf and to remit it to him. There was a no specific instruction as to the manner of remittance. The bank set the amount by draft. Placed in a letter sent by ordinary part. The bank was held negligent in sending the amount like that certain cheques were paid into a bank for collection. The bank sent them to the drawee bank for collection, but they were lost in transit. The bank was held liable to the customer for the principal value of the cheques.

Pannalal Jankidas v. Mohanlal, (1950) 1 SCR 979: An agent having been instructed to insure certain goods, failed to do so. The goods were lost in an explosion at the docks. Even if the agent had taken out a fire insurance policy in the usual from it would not have covered a loss of this kind, as fire due to the explosion would have been an excepted peril.

Jayabharthi Corporation v. SV P.N. SN Rajasekara Nadar, MANU/SC/0108/1992 : AIR 1992 SC 596: The defendant-respondent had grossly miscondacted himself firstly when he communicated to the appellat that the goods have been purchased at the rate of Rs. 36 per pound when they had not been and further stating that these goods would be dispatched as soon as the transporters' strike was over. The defendant later on informed the appellat that the goods could not be purchased as that delivery was dependant on yet another party. The defendant had misinformed his principal and his misconduct squarely comes within section 218 of Contract Act and the defendant must bear the brunt to pay the damages.

Section 213. Agent's accounts.-An agent is bound to render proper accounts to his principal on demand.

A principal is bound by the knowledge of his agent provided that knowledge is on a material point and the knowledge in such that the agent was bound to communicate the knowledge acquired by him to his principal.

Section 214. Agent's duty to communicate with principal.-It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and is seeking to obtain his instructions.

Explain the rights of principal in agency.

Section 215. Right of principal when agent deals, on his own account, in business of agency without principal's

consent.-If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him:

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

A transaction, which necessarily puts the agent's duty in conflict with the interest, must be presumed to be disadvantageous to a principal who is not informed of the fact. Thus, section 215 may be invoked if any of the following element is satisfied-

(a) that any material fact has been dishonestly concealed from the principal by the agent, or

(b) that the dealings of the agent have been disadvantageous to the principal.

Section 216. Principal's right to benefit gained by agent dealing on his own account in business of agency.-If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of an account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

An agent is bound to render account to his principal for all profits made by him in the course of his employment, and is compelled to account in equity. At the same time there is a legal duty, incumbent upon him whenever any profits so made have reached his hands to pay over the amount as money absolutely belonging to his employer, unless there is an account remaining to be taken between him and his employer.

Section 217. Agent's right of retainer out of sums received on principal's account.-An agent may retain, out of any sums received on account of the principal in the business of the agency, all monies due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

The principal is the full owner and has complete control over his properties in the hands of the agent subject only to the latter's statutory right of retainer and lien. But when a principal sells his export licence through his agent to a third party, the transaction is illegal and therefore, the principal is not entitled to recover back the sum received by the agent.

Section 218. Agent's duty to pay sums received for principal.-Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

National Shipping Co. of Saudi Arabia v. Sentrans Industries Ltd., (2004) 2 Bom CR 1: If an agent receives money on his principal's behalf under an illegal and void contract, the agent must account to the principal for the money so received and cannot set-up the illegality of contract as a justification for withholding payment which legality the controlling party has waived by paying the amount.

Dalpathi Jhanjhrani v. West End Watch Co., AIR 1953 WB 18: When a person wrongfully converted the goods of another person and received the amount, the owner of the goods may sue for the recovery of the money on the basis of an implied contract of agency the defendant being fictitiously assumed to have rightly received the money as the plaintiff's agent and to have failed to pay it over to the principal.

Section 219. When agent's remuneration becomes due.-In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act, but an agent may detain monies received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Section 220. Agent not entitled to remuneration for business misconducted.-An agent who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations

(a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security, B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad. Whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

Turner v. Goldsmith, 1 QB 544: In this case, the plaintiff was employed by the defendant a manufacturer of shirts for a period of five years as his agent and canvasses. It was his duty to obtain order for and sell the goods either manufactured or sold by the defendant. Before the lapse of the period of five years, the factory was burnt by fire and he did not, thereafter, restart his business. Consequently the agency of the plaintiff was terminated. He sued the defendant for breach of the contract of his employment as an agent.

It is observed that it is the right of the agent to receive from his principal the remuneration which was agreed. If remuneration was not agreed, he will be entitled to receive reasonable remuneration, regard being had to the nature of the work performed by him.

Alopi Prasad & Sons Ltd. v. Union of India, MANU/SC/0057/1960 : AIR 1960 SC 588: Compensation quantum meruit is awarded for work done as services rendered, when the price thereof is not fixed by a contract. Fees work done or services rendered pursuant to the terms. Compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in that behalf.

Define Agent's lien on principal's property.

Section 221. Agent's lien on principal's property.-In the absence of any contract to the contrary, an agent is entitled to retain goods, paper and other property whether movable or immovable of the principal received by him. Until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Section 221 of the Contract Act provides that in the absence of a contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable or immovable of the principal received by him, until the amount due to him for commission, disbursements and services in respect of the same has been paid or accounted for to him. An agent who is entitled to be reimbursed from the principals' property for the expenses incurred, advances made or losses sustained during the course of the agency or who is entitled to be compensated for his services has a lien upon the principal's good or property which comes lawfully in his possession during the course of agency from which the right to indemnity on compensation arise.

What are essentials for lien?

Essentials for lien:-

- (i) The agent must be in lawful possession of the goods.
- (ii) There must not be any right inconsistent with the lien. Example. If the property is handed over to the agent for

some particular purpose which is inconsistent with his right of lien. He cannot claim the lien

(iii) The property should belong to the principal

(iv) The property should have been received by him in his capacity as an agent

(v) The right of lien is subject to the rights of third parties and equities against the principal.

Loss of a lien.-Lien is lost in following cases:

(i) loss of possession

(ii) waiver of right of lien by agent

(iii) Agreement entered into by agent inconsistent with his right of lien.

Southern Roadways Ltd. v. S.M. Krishnan, (1989) 2 SCC 603: MANU/SC/0124/1990 : AIR 1990 SC 673: It was held by Supreme Court that an agent holds the principal's property only on behalf of the principal. He acquires no interest for himself in such property. He cannot deny principal's title to property.

Principal's duty to agent

What are the principal's duties to agent? Explain.

Section 222. Agent to be identified against consequences of lawful acts.-The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incur expenses. A is liable to B for such damages, cost and expenses.

Alopi Prasad v. Union of India, AIR 1960 SC 558 (594): The Supreme Court observed that section 222 does not entitle the arbitrator to award compensation to the agent in excess of the expressly stipulated consideration.

The Bhopal Sugar Industrial Ltd. v. Sales Tax Officer, Bhopal, MANU/SC/0284/1997 : AIR 1997 SC 1275: Section 222 mandates that if any loss is suffered by the agent, the principal would indemnify the same. This is so since a contract of agent is different from a contract of sales as an agent after delivery of the property does not sell it as his own property but sells the same as property of the principal and under his instruction and directions. The loss thus suffered by the agent has to be indemnified.

J. Ramaraj v. Ilyaz Khan, AIR 2007 Kant 2031: The contract was for supply of goods. The petitioner was working as a commission agent transacting business on behalf of the company. The court said that once the cheque was issued duly signed by the petitioner, he became liable to be prosecuted against. There was failure on the part of the agent to reply to the notice to inform the complainant that the primary liability was that of the principal for the amount due if any.

Section 223. Agent to be indemnified against consequences of acts done in good faith.- "Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it may cause an injury to the rights of third persons.

Illustrations

(a) A, a decree-holder and entitled to execution of B's goods requires that officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.

Section 224. Non-liability of employer of agent to do a criminal act.-Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise to indemnify him against the consequences of that act.

Illustrations

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

Firm Pratap Chand v. Firm Kotrike, MANU/SC/0028/1974 : AIR 1975 SC 1223: The Supreme Court observed that "A claim for indemnification, under section 222 of Contract Act, is only maintainable if the acts, which the agent in employed to do are lawful. Agreements to commit criminal acts are expressly and specifically excluded by section 224 of the Contract Act, from the scope of any right to an indemnity."

Section 225. Compensation to agent for injury caused by principal's neglect.-The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

Effect of Agency on Contracts with Third Persons

How can agent's contract be enforced and what are the consequences thereof?

Section 226. Enforcement and consequences of agent's contracts.-Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into the acts done by the principal in person.

Illustrations

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.

(b) A, being B's agent, with authority to receive money on his behalf, receive from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

Nandlal Thanvi v. LR of Goswami Brij Bhushan, (2004) ICC 103: The authority of an agent means his capacity to bind the principal. It refers so "the sum total of the acts it has been agreed between principal and agent that the agent should do on behalf of the principal. When the agent does any of the such acts it is said he has acted within his authority.

Section 227. Principal how far bound, when agent exceeds authority.-When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between his and his principal."

Illustration

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Section 228. Principal not bound when excess of agent's authority is not separable.-Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration

A, authorizes B to buy 500 sheeps for him. B buys 500 sheeps and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

Ahmad v. Mammad Kunhi, MANU/KE/0052/1987 : AIR 1987 Ker 228: When an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Aulapa Nayak v. Narse Keshawji, (1871) 8 Bom HC: Where an agent was instructed to contract for the purchase of cotton to be delivered at the end of January, the principal was held not liable when the agent contracted for delivery in the middle of that month.

Section 229. Consequences of notice given to agent.-Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustrations

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him before C.

According to this provision, notice to be received by the agent must be in the course of business transacted by this for the principal if receiving a notice in question is not within his authority and is the agent's lack of authority in this regard is known to the party serving the notice, then certainly the party serving the notice cannot rely upon the service of the notice on such as agent as the service on the principal.

Section 230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.-In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary.-Such a contract shall be presumed to exist in the following cases:-

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- (2) where the agent does not disclose the name of his principal;
- (3) where the principal, though disclosed, cannot be sued.

Union of India v. Chinoy Chablani & Company, MANU/WB/0089/1982 : AIR 1982 Cal 365: Section 230 has two parts. The first part provides that an agent can neither personally enforce nor he is personally bound by contracts entered into by him on behalf of his principal unless there is a contract to the effect that the agent may personally enforce or be bound by contract. The second part of their section engrafts an exception to the above rule. It says that although there is no specific contract to the effect that the agent may personally enforce the contracts or be personally bound by them, yet the law will presume the existence of such contract that an agent may personally enforce the contracts and be bound by them.

Jagva Industries and Sales Co. Pvt. Ltd. v. Mst. Anis Fatima Begum, AIR 2007 (NOC) 81 Cal: Section 230 is no bar to implead agent as party for other purpose or may be for effective adjudication of the suit it called for.

Section 231. Right of parties to a contract made by agent not disclosed.-If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil before the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Section 232. Performance of contract with agent supposed to be principal.-Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the right and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt."

Davison v. Donaldson, (1882) 9 QBD 628: The managing owner and the ship's husband purchased goods on credit from the plaintiff for the purposes of the ship. The undisclosed partner settled his account with the husband believing that the latter had paid the plaintiff. But he had not done so and had gone bankrupt. The plaintiff sued the principal.

The court said: "Where a person is supplied with goods it is his duty to see that the seller is paid.....partners ought not to settle with their co-partner without satisfying themselves that the payment have been actually made."

Section 233. Right of person dealing with agent personally liable.-In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

Section 233 of the Contract Act gives the party dealing with an agent who is personally liable a double form of election, he can choose between suing both principal and jointly or elects to sue one of them. In any case, if he sues one of them, a suit against the other will be barred. But if sues both and one constants to judgment that cannot be a bar to his continuing the suit against the other.

Section 234. Consequences of inducing agent or principal to act on behalf that principal and agent will be held exclusively liable.-"When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induce the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively."

Section 235. Liability of pretended agent.-A person untruly representing himself to be the authorized agent of another,

and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Kishori Prasad v. Secy. of State, MANU/WB/0187/1937 : AIR 1938 Cal 151: This section applies to a person who represents that he has the authority from another whereas he has no such authority. To render the agent liable it is necessary that the representation is construe. If the defendant represents himself to be the authorized agent of his father and enters into a contract with the telegraph office but his father did not ratifies his acts, the defendant will be liable to make compensation to the plaintiff in respect of any loss or damage which the plaintiff has suffered by dealing with him.

Section 236. Person falsely contracting as agent, not entitled to performance.-A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

Section 237. Liability of principal inducing belief that agent's unauthorized acts were authorized.-When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third person to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

Section 238. Effect, on agreement, of representation or fraud by agent.-Misrepresentation made or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretende consignor.

O entrusted diamonds to S, a diamond broker. On S's representation that two specified terms would probably by them. S did not show the jewels to either firm but pledged them with A who advanced money in good faith. O produced evidence than in diamond trade a broker employed to sell had no authority to pledge. O sues S & A.

Since S had no authority to pledge, under section 238. O will not be affected by his fraud or misrepresentation. O can recover diamonds from A because the contract of pledge between S and A is void. A cannot recover from O the money he gave to S.

An agent appointed to sell his principal's good or property has often to make statements concerning the nature and quality of the property and, in his enthusiasm to find a customer, may make exaggerated statements. The law does not like to hold the principal liable for the agent's extravagant statement unless if finds some fault with the principal himself.

PART II

SPECIFIC RELIEF

CHAPTER I

RECOVERING POSSESSION OF PROPERTY

(Sections 5-8)

Define the manner for recovery of specific immovable property.

Section 5. Recovery of specific immovable property.-

A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

When a person is entitled to the possession of specific immovable property he can recover the same by filing a suit as provided by C.P.C. He may file a suit for ejectment on the basis of strength of his title and get a decree for ejectment. Then he may execute the decree in accordance with the provisions of C.P.C. He cannot take law in his own hand and obtain possession of the property with force, even though he is entitled to the same. For example, if A agrees to convey some specific immovable property to B and also hand over the possession. B can file a suit against A requiring A to fulfil the promise and handover the possession. The requirement of law is filing of Civil suit rather than merely sending a notice demanding possession on by a letter sent by Registered Acknowledgment due.

East India Hotels Ltd. v. Syndicate Bank, 1992 Supp (2) SCC 29: Suppose A enters into peaceful possession of land claiming it as his own although he might have no title to it, still he can sue another who has forcibly ousted him from possession and who has no better title to it because A although he has no legal title, has at least a possessory title.

Prabha Manufacturing Industrial Co-operative Society v. Banwari Lal, MANU/SC/0412/1989 : AIR 1989 SC 1101: The Supreme Court held that a suit under section 5 is an ordinary suit under the general law and plaintiff has to prove that he has a better title. Further, specific performance can be decreed only against the executant of the contract having the right to dispose of the property in question.

Somnath v. Raju , MANU/SC/0399/1969 : AIR 1970 SC 846: Mere possessory title is good enough to maintain an action under section 5 of Specific Relief Act.

V. Rajeshwari v. T.C. Saravanabava, MANU/SC/1057/2003 : (2004) 1 SCC 551: A decision as to a specified part of the property in question may not constitute res judicata in respect of any subsequent proceedings about the entire property.

Section 6. Suit by persons dispossessed of immovable property.-

(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be setup in such suit.

(2) No suit under this section shall be brought-

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suit to establish his title to such property and to recover possession thereof.

What are the essential elements to suit by person dispossessed of immovable property?

Essential Elements.-Section 6 has following elements:-

- (a) At the time of dispossession the possession of the plaintiff must be valid;
- (b) The plaintiff must have been dispossessed of Immovable property without his consent;
- (c) The dispossession must not have been made in due course of law;
- (d) If at the time of dispossession, the plaintiff's possession was valid and he was been dispossessed without resort to due course of law, he may recover possession of specific immovable property notwithstanding any title that may be set up in the suit against him;
- (e) In order to recover possession the suit must have been filed within six months of the date of dispossession;
- (f) under section 6 suit to recover possession cannot be filed against the Government.

East India Hotels Ltd. v. Syndicate Bank, 1992 Supp (2) SCC 29 (36): The purpose behind section 6 of the Act is to restrain a person from using force and to dispossess a person without his consent otherwise than in due course of law.

(2) Yeshwant v. Jagdish, AIR 1968 SC 620: Due course of law it implies that right of the person affected thereby to be present before the tribunal which pronounces judgement upon the question of life, liberty or property in its most comprehensive sense, to be heard by testimony or otherwise and to have the right determination of the controversy by proof every material fact which bears on the question of fact or liability be conclusively proved or presumed against him.

(3) Ganeshmal v. Velaram, MANU/RH/0149/2000 : AIR 2000 Raj 76: If the plaintiff has been dispossessed of the property by an order of the Sub-Divisional Magistrate (S.D.M.) in proceedings under section 145, Cr. P.C. in which the plaintiff is not a party, the dispossession of the plaintiff is not in the due course of law.

(4) Mahabir Prasad Jain v. Ganga Singh, MANU/SC/0638/1999 : AIR 1999 SC 3873: It has been held by Supreme Court that a person seeking equitable relief under the specific relief Act, should come to the court with clean hands.

(5) Sukhjeet Singh v. Sirajunnisa, MANU/MP/0101/2000 : AIR 2001 MP 59: The tenant handover possession of premises to the landlord for marriage of former's son. The landlord failed to hand over the possession again to the tenant after his son's marriage.

It was held that even though the tenant may have been deceived later on but since he handed over the possession of his total volition, he could not claim the possession again under section 6 as the section was not attracted in this situation.

(6) K.K. Verma v. Union of India, MANU/MH/0102/1954 : AIR 1954 Bom 358: Possession here means legal possession which may exist with or without actual possession and with or without a rightful origin. Thus where a trespasser is allowed to continue on the property and the owner sleeps upon his rights and makes no efforts to remove him, he will gain possession under section 6. The possession of a tenant after the termination of the tenancy continues to be a juridical possession.

(7) Express Newspapers (P) Ltd. v. Union of India, MANU/SC/0273/1985 : AIR 1986 SC 872: The Supreme Court reminded the Government that even where a perpetual lease for construction of an office block provided for the lessor's right of re-entry upon forfeiture of lease upon breaches of the condition of leases, the lessor would not have the right to declare such forfeiture all by itself and then take to itself to throw out the lessee either directly or through the summary procedure under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

(8) Anathula Sudhakar v. P. Buchi Reddy, MANU/SC/7376/2008 : AIR 2008 SC 2033: Where the title of the plaintiff is under a cloud and the possession is not with him, the remedy in such a case in suit for declaration and possession with or without injunction.

(9) *Sivam K. Jain v. Ram Mahajan*, MANU/SC/7448/2008 : AIR 2008 SC 2101: Where the plaintiff fails to provide details of accrual of cause of action, the defendant's claims for part-performance and the payment receipts are admitted by the plaintiff. Suit for possession will be liable to be dismissed.

Explain the principle laid down in section 7.

Section 7. Recovery of specific movable property.-

A person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908.

Explanation 1.-A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation 2.-A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

Features

- (1) This section can be attracted only when the plaintiff is entitled to the possession of movable property.
- (2) The property must be specific.
- (3) The recovery of possession can be made in the same manner as is provided in Civil Procedure Code.

Illustrations

(a) A bequeaths land to B for his life, with remainder to 'C'. A dies. B enters on the land, but C, without B's consent obtains possession of the title deeds. B may recover from C.

(b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession whatever right he may have to secure their safe custody.

(c) A receives a letter addressed to him by B. B gets back the letter with the consent of 'A'. A has such a property therein as entitled him to recover it from B.

State of Gujarat v. Biharilal, MANU/SC/0192/1999 : AIR 1999 SC 1999: There was an agreement between Biharilal and the occupants of land, in 1964 authorising Biharilal to cut and remove trees standing on certain land for a period of two years. The forest authorities did not grant permission to cut and remove the trees and the period expired. There was no fresh agreement between the parties, nor was the period of authority in favour of Biharilal extended. Biharilal filed a suit for declaration of his right to cut and remove the trees and also for the necessary permission to do the needful.

It was held that since the right in respect of the trees had already expired the suit filed by Biharilal could not be decreed.

Standard Chartered Bank v. Andhra Bank Financial Services Ltd., MANU/SC/2534/2006 : (2006) 6 SCC 94: The substantive prayer in the plaint was for a declaration that the plaintiff were fully "entitled" to the suit bonds and certain reliefs which were founded upon this declaration. A suit for such a declaration would certainly be a title suit so far as the suit bonds were concerned. On dismissal of the suit, the appeal against it was brought on the footing that the plaintiff had fully proved its title to the suit bonds and the special court had erroneously held against the plaintiff. The court said that looking at the suit from any point of view, it could not be held that the suit was a mere declaratory suit, it had to be regarded as a title suit.

Article 91(b) of the Limitation Act, 1963 prescribes a period of three years limitation for the suit computable from the date when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

Recovery of possession under Bailments.-If the bailee, who was in the possession of the goods, is dispossessed of the same, the suit for recovery of possession may be brought either by the bailor or the bailee against the third person interfering with the possession. Section 180, Indian Contract Act, 1872, makes the following provision in this regard:

180. Suit by bailor or bailee against wrong-doer.-If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made, and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Section 8. Liability of person in possession, not as owner, to deliver to persons entitled to immediate possession.-

Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:-

- (a) where the things claimed is held by the defendant as the agent or trustee of the plaintiff;
- (b) when compensation in money would not afford the plaintiff adequate relief for the loss of the things claimed;
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss;
- (d) when the possession of the things claimed has been wrongfully transferred from the plaintiff.

Explanation.-Unless and until the contrary is proved, the court shall, in respect of any article of movable property claimed under clause (b) or clause (c) of this section, presume-

- (a) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;
- (b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

Illustrations

(a) A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B without A's authority pledges the furniture to C, and C knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

(b) Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

(c) A is entitled to a picture by a dead painter and a pair of rare china vase B has possession of them. The articles are of too special a character to bear an ascertainable market value. B may be compelled to deliver the idol to A.

Essentials

- (1) The defendant should be in possession or control of a particular article,
- (2) Such article should be movable property, rather than immovable property,
- (3) The defendant should not be the owner of such article, and
- (4) The plaintiff should be entitled to the immediate possession of such articles.

Jaldu Venkata Subba Rao v. Asiatic Steam Navigation Co., ILR (1914) Mad 1 (FB): The object to this section is to provide special remedy so that persons having the possession or control of particular articles of movable property: although not their owners may be compelled specifically to deliver them to the persons entitled to their immediate possession.

Possession in the foundation of the suit though a suit is not competent under this section against one who is the

owner of the movable property. Possession and control of the defendant must therefore be clearly alleged in plaint and proved.

Kizhakkumpurath v. Thanikkuzhiyil, MANU/KE/0429/1998 : AIR 1998 Ker 244: There was oral and documentary evidence that the plaintiff was the owner of certain scheduled items and the defendants had trespassed into these items. The plaintiff was held entitled to recover those items from the defendants and also mesne profits or compensation as well.

Section 5 and section 6 Distinguished.-

The distinction between these two sections are as under:

- (1) Under section 5 the plaintiff has to file a long-drawn regular suit for ejection whereas section 6 gives a summary remedy.
- (2) Under section 5, claim is based on title while under section 6 the claim is based on possession and no proof of title is required and even a rightful owner may be precluded from showing his title to the land.
- (3) The period of limitation in section 5 is 12 years while in section 6 it is only six months from the date of dispossession.

Distinguish section 7 with section 8.

Section 7 and section 8 Distinguished.-

- (1) Under section 8, no suit can be brought against the owner while under section 7 a person having a special or temporary right to present possession may bring the suit even against the owner of the property.
- (2) Under section 7, a decree is for the return of movable property, or for the money value thereof in the alternative, while under section 8 the decree is only for the return of the specific article.
- (3) A suit under section 7 is maintainable against even the owner of the property if the immediate right to possession vests in the plaintiff and not in the owner while under section 8 the suit is not maintainable against the owner.

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CHAPTER II

SPECIFIC PERFORMANCE OF CONTRACT

(Sections 9-25)

Define specific performance.

A contract is an agreement upon consideration to do or not to do a particular thing, if the person on whom this contractual obligation rests, fails to discharge it, other party has a right either to insist on the literal and actual performance of the contract or to obtain compensation for the non-performance of it. The former is called "specific performance."

In the words of Fry: "The specific performance" of a contract is its actual execution according to its stipulation and terms, and is contrasted with damages or compensation for the non-execution of the contract.

Pomeroy defines.-

Specific performance as consists in the contracting party, exact fulfilments of obligation which he has assumed in his doing or omitting the very act which he has undertaken to do or omit.

Halsbury defines.-

"Specific performance" as an equitable relief given by the court in cases of breach of contract in the forms of a judgment that the defendant do actually perform the contract according to its terms and stipulation.

A contract; according to the Indian Contract Act, is an agreement enforceable by law. From every contract there immediately and directly results an obligation on each of the contracting part towards the other to perform such of the terms of the contract as he has undertaken to perform.

Ameer Mohd v. Barkat Ali, MANU/RH/0442/2002 : AIR 2002 Raj 406: If the person on whom this obligation rests, fails to discharge it, these results in morality to the other party a right at his election either to insist on the actual performance of the contract or to obtain satisfaction for the non-performance of it.

Section 9. Defences respecting suits for relief based on contract.-

Except as otherwise provided herein, where any relief is claimed under this chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

According to section 2(b) of Indian Contract Act, 1872, a contract is an agreement enforceable by law. If the agreement is not enforceable by law a suit for specific performance of the same cannot lie.

A valid contract has to satisfy the requirement of section 10 of the Contract Act. There has to be an agreement. It has to be between the parties competent to contract. There must be free consent of the parties it should be lawful consideration with lawful object and should not have been declared to be void.

The effect of section 10 of the Contract Act read with section 9, of the Specific Relief Act is to bar the enforcement of all void unlawful and imperfect agreements. Thus, there is merely moral religious or social obligation rather than a legal obligation specific enforcement of the same cannot be claimed. The bar to a suit for specific performance would cover on agreement by a minor as the same is void.

Section 9 is a new provision. There was no such provision in the Specific Relief Act, 1877. This new section makes it clear that in a case relating to a specific enforcement of contract, the defendant may take all those defences which are available to him under any law relating to contracts. For example, the defendant can take the defence provided under the Indian Contract Act, 1872 such as incapacity of the parties, fraud, mistake, under influence on coercion.

Bishandayal and Sons v. State of Orissa, (2001) 1 SCC 555: AIR 2001 SC 544: it has been held that even a Government contract which is concluded without fulfilling the requirement prescribed by article 299 of Constitution of

Indian cannot be specifically enforced.

From the point of view of the specific performance of contracts under Specific Relief Act, 1963 contracts can be divided into two categories:

- (i) contract which can be specifically enforced, and
- (ii) contract which cannot be specifically enforced.

What are the cases in which specific performance of contract are enforceable?

Section 10. Cases in which specific performance of contract enforceable.-

Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

- (a) when there exist no standard for ascertaining actual damages caused by the non-performance of the act agreed to be done; or
- (b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation.-Unless and until the contrary is proved, the court shall presume-

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases:-

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market,

(b) where the property is held by the defendant as the agent or the trustee of the plaintiff.

on the breach of contract. By one party the other has two alternatives.

- (i) to bring an action for breach of contract
- (ii) to sue for the specific performance of the contract.

In an action for specific performance, he can require actual execution of the contract in terms of the agreement between the parties.

Illustration

(a) A agrees to buy and, B agrees to sell, a picture by a dead painter and two rare china vases. A may compel B specifically to performance this contract, for there is no standard for ascertaining the actual damages which would be caused by its non-performance.

(b) A contracts with B to sell to him a horse for Rs. 1000 B is entitled to a decree directing A to convey the horse to him, he paying the purchase-money.

(c) A contract to sell and B contracts to buy, certain number of railway shares of a particular description. A refuses to complete the sale. B may compel A specifically to performance this agreement for the shares are limited in number and not always available in the market, and their possession carries with it the status of a shareholder which cannot otherwise be procured.

(d) A contracts with B to paint a picture for B who agrees to pay therefor Rs. 1000. The picture is painted. B is entitled to have it delivered to him on payment or tender of Rs. 1000.

Essentials

(i) No standard for ascertaining damages.-

Specific performance of a contract is permitted when there exist no standard of ascertaining actual damages caused by the breach of contract. If the damage caused by the breach of contract is ascertainable, the remedy available is a claim for damages rather than specific performance of the contract.

For instance, if the article sold is such that it is available in the market, the loss is ascertainable on the basis of the difference between the contract price and the market price on the date of breach of contract. In such a situation, specific performance is not permitted.

Banwari Lal Agarwala v. Ram Swarup Agarwala, MANU/BH/0021/1998 : AIR 1998 Pat 88: It was held that the plaintiff tenant was entitled to a decree of specific performance contract under section 10 of Specific Relief Act. Hence, the tenant suit for specific performance is to be decreed. Where from some special or practical features or incidents of the contract either in its subject-matter or in its terms or in the relation of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with sufficient degree of certainty so that so real compensation can be obtained by means of an action at law, the contract will be enforced in specie.

(ii) When money compensation would not provide adequate relief.-

Specific performance of a contract is also permitted when the act agreed to be done in such that compensation in money for its non-performance would not afford adequate relief.

Ram Karan v. Govind Lal, MANU/RH/0222/1999 : AIR 1999 Raj 167: There was an agreement for the sale of agricultural land. The buyer had paid full sale consideration to the seller, but the seller even then avoided executing the sale deed as per the agreement. The buyer brought an action for the specific performance of the contract, viz., he prayed for a direction to the seller to execute the sale deed.

It was held that the case was covered by section 10(b) of the Specific Relief Act therefore, the seller was directed to specifically performs the contract by executing sale deed in favour of the buyer.

(iii) Pecuniary Compensation not recoverable.-

The insolvency of a defendant is generally a ground for granting specific relief to the plaintiff under the head. Where there is a probability that pecuniary compensation if awarded cannot be recovered, specific performance may be granted

Thus, insolvency of the defendant seems to be a ground for granting specific relief to the plaintiff. The contracts to pay money are normally not specifically enforceable because damages will usually be an adequate remedy. Courts are empowered to specifically enforce contracts in which the act agreed to be done in such that if it is not performed pecuniary compensation for its non-performance would not afford adequate relief. It follows that where compensation in money is an adequate relief to the plaintiff, a decree for specific performance of the contract should not be made.

A court of equity decrees specific performance of a contract for land not due to the real nature of land but because damages at law which must be calculated upon the general money value of the land may not be a complete remedy to the purchase to whom the land may have a peculiar and special value.

Brahmavati v. Ramesh Chand, MANU/UP/0232/1980 : AIR 1980 All 296: The Allahabad High Court has held that in a suit for a specific performance of a original contact, extension of the period for convenience given only by some heirs could not deprive the purchaser of his remedy for specific performance.

Explain the specific performance in connection of trust.

Section 11. Cases in which specific performance of contracts connected with trusts enforceable.-

(1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Illustrations

(a) A is trustee of land with power to lease it for seven years. He enters into a contract with B to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specially enforced.

(b) The Directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contracted to sell it without any such sanction. This contract cannot be specifically enforced.

(c) Two trustees. A and B, empowered to sell trust property worth a lakh of rupees. Contract it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C can not enforce its specific performance.

Whether it is possible for the specific performance of part of contract?

What are the rights of purchaser or lessee against the other with no title or imperfect title?

Section 12. Specific performance of part of contract.-

(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either-

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money,

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party-

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), pays or had paid the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically enforced, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically enforced, the court may direct specific performance of the former part.

Explanation.-For the purpose of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist

at the time of its performance.

Kartar Singh v. Harjinder Singh, MANU/SC/0158/1990 : AIR 1990 SC 854: Section 12(1) propounds a general principle that ordinarily the court shall not direct the specific performance of a part of contract. But where the respondent and his sister are jointly the owner of a property and the respondent contracts to sell the entire property for Rs. 20,000 but the sister refuses to sell her property. This matter is not of the performance of a part of contract and is thus not covered by section 12.

Sardar Singh v. Krishna Devi, MANU/SC/0102/1995 : AIR 1995 SC 491: It is well-settled law that justice demands partial enforcement of contract instead of refusal of specific performance is its entirety.

Chattar Singh v. Arjun Singh, MANU/RH/0024/1995 : AIR 1995 Raj 73: Transfer by a person not authorised to dispose of the transferable properties not his own are void ab initio in law.

Kalyankur Lime Works v. State of Bihar, MANU/SC/0039/1954 : AIR 1954 SC 165: The purchaser may relinquish claim to further performance of the remaining part of the contract and the right to compensation at any stage of the proceedings.

Section 13. Rights of purchaser or lessee against person with no title or imperfect title.-

(1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (Subject to the other provisions of this Chapter), has the following rights, namely:-

- (a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;
- (b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;
- (c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;
- (d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposits, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Section 13 of the Specific Relief Act is based on the "doctrine feeding the grant by estoppel:" Accordingly, where a person represents valid title and enters into contract to sell the property and subsequently acquires valid title cannot evade the performance of the contract but is obliged to perform the contract and cannot plead the prior defective or imperfect title to evade the contract.

Rajasara Ramjibhai Dahyabhai v. Jani Narotamdas Lallubhai, AIR 1986 SC 1912: Where a party to a contract has agreed to transfer agricultural land subject to the condition that he would obtain permission from the collector to convert the land for non-agricultural purposes, such a contract can be specifically enforced only when on account of passing of some Act.

In this case, the suit for specific performance was filed within three years of the date when the said permission was given. Therefore, the Supreme Court held that the suit was not barred by limitation.

Explain in brief, the contracts which cannot be specifically enforced by court of law.

Section 14. Contracts which cannot be specifically enforced.-

(1) The following contracts cannot be specifically enforced, namely:-

- (a) a contract for the non-performance of which compensation in money is an adequate relief;
- (b) a contract which runs into such minute or numerous details or which is so dependant on the personal qualification or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;
- (c) a contract which is in its nature determinable;
- (d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced, but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific perform once in the following cases-

(a) where the suit is for the enforcement of a contract-

- (i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract, or

- (ii) to take up and pay for any debenture of a company.

(b) where the suit is for-

- (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership, or

- (ii) the purchase of a share of a partner in a firm.

(c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely-

(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work.

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief, and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

According to section 14 following contracts cannot be specifically enforced-

1. Where compensation in money is an adequate relief [section 14(1)(a)].-

Courts will not order specific performance of a contract where the aggrieved party can be adequately compensated in terms of money. An ordinary contract to lend or borrow money whether with or without security is an example of a contract which cannot be specifically enforced, though where a loan has been already advanced on the understanding that a security would be provided against it, this can be specifically enforced.

Illustrations

(a) A contracts to sell, and B contracts to buy, a lakh of rupees in the four per cent loan of the Central Govt.

(b) A contracts to sell, and B contracts to buy, 40 chests of indigo at Rs. 1000 per chest.

Ashok Kumar Srivastava v. National Insurance Co. Ltd., AIR 1988 SC 2046: In case of contract for the sale of something which has its special value and is not an ordinary article of commerce, such as rare coins, the contract can be specifically enforced, because compensation in money will not constitute an adequate relief in such a case.

2. Contracts which runs into minute or numerous details section 14(1)(b).-

The following kinds of contracts cannot be specifically enforced-

- (i) A contracts which run into such minute or numerous details, or
- (ii) Which is so dependent on the personal qualification or volition of the parties, or
- (iii) otherwise from its nature is such, that the court cannot enforce specific performance of its material terms.

Illustrations

- (i) A contracts to render personal service to B.
- (ii) A contract to employ B on personal service.
- (iii) A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

Executive Committee, State Warehousing Corporation v. Chandra Kiran Tyagi, MANU/SC/0499/1969 : AIR 1970 SC 1244: The Supreme Court had that ordinarily, the contracts for personal services cannot be specifically enforced. But this rule is subject to following three exceptions:

- (i) where a public servant has been dismissed from service in violation of Article 311 of the Constitution,
- (ii) where a worker has been dismissed from service under industrial law,
- (iii) where a legal body acts in violation of the provisions of the statute.

3. Contracts which are determinable by their nature.-According to section 14(1)(c) contracts which are determinable by their nature cannot be specifically enforced. For example A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically enforced, for if it were so performed, either A or B might at once dissolve the partnership.

4. Contracts regarding continuous duty requiring to supervision by court.-Section 14(1)(d) provides that a contract the performance of which involving continuing duty which the court cannot supervise cannot be specifically enforced.

Arbitration.-Section 14 provides in sub-section (2) that, except as provided by the Arbitration Act, 1940 (Now Arbitration and Conciliation Act, 1996) a contract to refer a present or future dispute to arbitration shall not be specifically enforced. An arbitration agreement operates as a bar to the filing of a suit.

Person for or against whom contracts may be specifically enforced (sections 15-19)

Explain with cases. Who can obtain the specific performance ?

Section 15. Who may obtain specific performance.-

Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by-

(a) any party thereto.

(b) the representative in interest or the principal of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party,

(c) where the contract is a settlement on marriage or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder,

(d) where the contract has been entered into by a tenant for life in due exercise of power, the remainderman,

(e) a reversioner is possession, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach,

(f) a reversioner is remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach,

(g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation,

(h) when the promoters of a company have, before its incorporation entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Section 15 enumerates the possible classes of persons who can file a suit for specific performance similarly. Section 19 mentions the possible classes of defendants i.e., against whom specific performance can be claimed. Both these sections are exhaustive defining that by whom and against whom specific performance can be obtained in a civil suit.

V.X. Joseph v. Pasupati, MANU/TN/0028/1994 : AIR 1994 Mad 193 (201): Where the father as Karta enters into a contract for the sale of ancestral property and at the time of the execution of the sale deed prospective purchaser demands that the minor son be also joined in the sale deed because he has benefited by the contract, the demand cannot be said to be unreasonable because Life Insurance Corporation has obtained a decree against the father and he had paid from the earnest money to avoid that decree. In such circumstances, the vendee will be entitled to get the decree of specific performance and the claim for alternative relief of payment of advance amount will not affect adversely the relief of specific performance.

Mukesh Kumar v. Col. Harbans Waratch, (1999) 2 SCC 380: In order to obtain a relief of specific performance, all co-contractees must be before the court but all of them need not to be on the same

side others can be joined as co-defendants. Where there is a single indivisible contract to convey land to several persons, some of them only cannot seek specific performance if the others do not want it.

T.M. Balkrishna Mudaliar v. M. Satyanarayan Rao, MANU/SC/0424/1993 : AIR 1993 SC 2449: A contract of right to repurchase was not personal but it is assignable. An assignee fall within the meaning of representative in interest as contemplated under clause (6) of section 15 acquired a valid title to claim specific performance.

Explain the parties who are barred to claim relief?

Section 16. Personal bars to relief.-

"Specific performance of a contract cannot be enforced in favour of a person-

(a) who would not be entitled to recover compensation for its breach,

or

(b) who has become incapable of performing or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or willfully acts at variance with, or in subversion of, the relation intended to be established by the contract, or

(c) who fails to over and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant,

Explanation.-For the purpose of clause (c)-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposits in court any money except when so directed by the court;

(ii) the plaintiff must ever performance of, or readiness and willingness to perform, the contract according to its true construction."

Illustrations

(1) A in the character of agent for B enters into an agreement with C to buy C's house A is in reality acting not as agent for B but on his account. A cannot enforce specific performance of the contract.

(2) A contracts to sell B a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A becomes insolvent neither he nor his assignee can enforce specific performance of the contract.

(3) A contracts to sell B a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A without B's consent, fells the trees. A cannot enforce specific performance of the contract.

Trimbak Shankar Tidke and Co. v. Tivrani Shankar Tidke, MANU/MH/0266/1985 : AIR 1985 Bom 128: According to section 16 specific performance of a contract cannot be enforced in favour of a person who fails to over and prove that he is 'ready and willing' to perform the essential terms of the contract. The averment that the plaintiff is ready and willing to perform the essential terms of the contract is necessary only in those cases. Where the plaintiff has already performed his part of the contract.

Syed Dastagir v. T.R. Gopalkrishna Shetty, MANU/SC/0471/1999 : AIR 1999 SC 3029: The readiness and willingness to perform the contract as required by Explanation (i) to section 16(c) means compliance in spirit and substance and not in letter and form.

A person who makes himself a party to an illegal contract cannot enforce his right under this section.

Rakha Singh v. Babu Singh, AIR 2002 P&H 270: Where the plaintiff showed that he was ready and willing to pay the purchase price and continued to be so, the failure to plead that he had money in the bank and had not withdrawn it, was immaterial because there was a matter of evidence and had not to be pleaded.

Pushparani S. Sundaram v. Pauline Manomani James, MANU/SC/2493/2000 : (2002) 9 SCC 582: When the purchaser had not sent any communication to the vendor regarding his readiness and willingness, had paid only an insignificant amount as advance, had not obtained permission from Ceiling Authorities had taken no steps towards the valuation of the superstructure on the land or required under the sale agreement, neither led evidence nor entered the witness box in support of his willingness, the Supreme Court held that the High Court had rightly upheld the dismissal of his suit for specific performance.

Maniklal Mukherjee v. Commissioner of Sanchaita Investment Calcutta, MANU/SC/0251/1993 : AIR 1993 SC 1571: A right to recover loan amount against an unattached property is not sustainable.

Chand Rani v. Kamla Rani, MANU/SC/0285/1993 : AIR 1993 SC 1742: In the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not being the essence of the contract the court may infer that it is to be performed in a reasonable time.

Explain the rule laid down in section 17 with illustrations.

Section 17. Contract to sell or let property by one who has no title, not specifically enforceable.-

(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor-

(a) who, knowing not to have any title to the property, has contracted to sell or let the property,

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Illustrations

(1) A without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract, even though C is willing to confirm it.

(2) A bequeaths his land to trustee, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustee may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustee cannot specifically enforce this contract. As, in the absence of B's consent to the particular sale to C, the title which they can give is, as the law stands, not free from reasonable doubt.

(3) A, being in possession of certain land, contracts to sell it to Z on enquiry it turns out that A claims the land as heir of B who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof A cannot compel Z specifically to perform the contract.

Section 18. Non-enforcement except with variation.-

Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases, namely-

(a) Where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract.

- (b) Where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce,
- (c) where the parties have, subsequently to the execution of the contract, varied its terms.

Illustrations

- (a) A, B, C sign a writing by which they purport to contract each to enter into a bond to D for Rs. 1000. In a suit by D to make A, B, and C separately liable each to the extent of Rs. 1000 they prove that the word 'each' was inserted by mistake; that the intention was they should give a joint bond for Rs. 1000. C can obtain the performance sought only with the variation thus set up.
- (b) A sues B to compel specific performance of a contract is writing to buy a dwelling house. B proves that he assumes that the contract included an adjoining yard and the contract was so framed as to leave it doubtful whether the yard was so included or not. The court will refuse to enforce the contract, except with the variation so set up by B.
- (c) A contracts in writing to let B a wharf, together with a strip of A's land delineated in a map before signing the contract. B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip A's land of the same dimensions, and to this A expressly assented. B then signed a written contract. A cannot obtain specific performance of the written contract except with the variation set up by B.
- (d) A contracts in writing to let a house to B for a certain term, at the rent of Rs. 100 per month, putting it first into tenable repair. The house turns out to be not worth repairing, so with B's consent, A pulls it down and erects a new house in its place: B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.
- (e) A and B enter into negotiations for the purpose of securing land for B for his life, with remainder to her issue. They execute a contract, the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

Discuss specific performance of a contract against whom enforced?

Section 19. Relief against parties and persons claiming under them by subsequent title.-

Except as otherwise provided by this chapter, specific performance of a contract may be enforced against-

- (a) either party thereto,
- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract,
- (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant.
- (d) where a company has entered into a contract and subsequently become amalgamated with another company, the new company which arises out of the amalgamation.
- (e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Illustrations

- (a) A contracts to convey certain land to B by a particular day. A dies intestate before that day without having

conveyed the land B may compel A's heir or other representatives in interest to perform the contract specifically.

(b) A contracts to sell certain lands to B for Rs. 5000 A afterwards convey the land for Rs. 6000 to C who has notice of the original contract. B may enforce specific performance of the contract as against 'C'.

(c) A contracts to sell land to B for Rs. 5000. B takes possession of the land. Afterwards A sells it to C for Rs. 6000. C makes no enquiry of B relating to his interest in the land B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.

(d) A contracts, in consideration of Rs. 1000 to bequeath certain of his land to B. Immediately after the contract A dies intestate, and C takes out administration to his estate. B may enforce specific performance of the contract against C.

(e) A contracts to sell certain land to B. Before the completion of the contract. A becomes a lunatic and C is appointed his guardian. B may specifically enforce the contract against C.

(f) A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed A dies, C may enforce specific performance of the contract against B.

(g) A and B are joint tenants of lands, his undivided moiety of which either may alienate in his life-time, but which, subject to that right, devolves on the survivor. A contract to sell his moiety to C and dies. C may enforce specific performance of the contract against B.

R.K. Mohammed Abidullah v. Haji C. Abul Wahab, MANU/SC/0433/2000 : AIR 2001 SC 1658: The plaintiff who was in possession of certain property as a tenant and purchased the same property brought an action for specific performance. Subsequent purchases contended that he was buyer in good faith and for consideration without notice and therefore he had a better title.

Discretion and powers of court

What are the discretion and powers of court?

Section 20. Discretion as to decreeing specific performance.-

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance,-

(a) where the terms of the contract or the conduct of the parties at the times of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though or not voidable, gives the plaintiff an unfair advantage over the defendant, or

(b) where the performance of the contract would involve some hardship on the defendant which he did not for see, whereas its non-performance would involve no such hardship on the plaintiff, or

(c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.-Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

Explanation 2.-The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances

existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the party.

The section 20 provides that the court has an absolute discretion to refuse specific performance even where the contract is otherwise enforceable and is lawful. However, the enforcement of a contract depends on a sound judicial discretion.

Sardar Singh v. Krishna Devi, MANU/SC/0102/1995 : AIR 1995 SC 491: It is something more than what is provided by section 14 where rigours are enumerated which, if available, the specific performance cannot be granted. As all contingencies of non-performance are difficult to conceive so this section is not exhaustive but is illustrative.

Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so.

Prakash Chandra Angadlal, MANU/SC/0022/1979 : AIR 1979 SC 1241: The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff.

Ganesh Shet v. Dr. C.S.G.K. Shetty, MANU/SC/0383/1998 : (1998) 5 SCC 381: The Supreme Court stated that the circumstances referred to in sub-sections (2) to (4) of section 20 with regard to exercise of discretion in granting relief of specific performance are not exhaustive and such relief will not be granted if injustice is caused.

What are the powers of court to award compensation? Explain with examples.

Section 21. Power to award compensation in certain cases.-

(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceedings, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.-The circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

Illustrations

1. A contracts to sell a hundred maunds of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The court is of opinion that A has made a valid contract and has broken it, without excuse to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

2. A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The court may award a compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

3. A sues for the specific performance of a resolution passed by the Director of a public company under which he was entitled to have certain share allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award A compensation for the non-performance.

Jagdish Singh v. Nather Singh, MANU/SC/0313/1992 : AIR 1992 SC 1604: Section 21 comes into operation in two types of cases. Firstly, where the defaulting party commits the breach of contract against which wronged party is otherwise entitled to compensation and court decides that specific performance ought not to be granted. Secondly the decision of court is in favour of specific performance but the same is insufficient to satisfy the demand of justice, hence some compensation in addition is considered proper to render full justice.

What are the powers of the court to grant relief? Explain with relevant case laws.

Section 22. Power to grant relief for possession, partition, refund of earnest money, etc.-

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceedings, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21.

If the vendor dies before executing sale agreement, his legatees can be acquired to specifically perform the agreement and render possession of property to the purchaser.

Goparaju Venkata Bharata Rao v. Nagula Ramakotayya, MANU/AP/0915/2001 : AIR 2001 AP 425: There was agreement for sale of property in favour of the plaintiff. The plaintiff was put in possession of suit property. The execution of the agreement was to take place after entire consideration was paid by the plaintiff. The original owner died. Her legatees under will dispossessed the plaintiff and postponed execution of sale deed.

The plaintiff proved that the agreement to sell was a genuine document. In a suit for specific performance it was held that the plaintiff was entitled to relief of specific performance of agreement possession of property as against, the legatee of the original owner property.

P.C. Varghese v. Devaki Amma Balambika Devi, MANU/SC/1085/2005 : AIR 2006 SC 145: Decree for partition and separate possession of property can be granted in addition to decree for specific performance of contract.

Whether the liquidation of damages is a bar to specific performance? Explain.

Section 23. Liquidation of damages not a bar to specific performance.-

(1) A contract, otherwise proper to be specifically enforced, may be so enforced, though a sum be named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

(2) When enforcing specific performance under this section, the court shall not also decree payment of the sum so named in the contract.

Illustration

A contracts to grant B an under lease of the property held by A under C, and that he will apply to C for a licence necessary to the validity of the under-lease and that, if the licence is not procured. A will pay B Rs. 10,000 A refuses to apply for the licence and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the licence.

Section 24. Bar of suit for compensation for breach after dismissal of suit for specific performance.-

The dismissal of suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

The section 21 makes it obligatory for the plaintiff to also claim compensation or damages for breach of contract either as an alternative or in substitution in a suit for specific performance. The provisions of section 24 are enacted as a necessary corollary to section 21 providing a caution by creating a bar against filing any fresh suit for compensation for breach of contract upon dismissal of a suit for specific performance.

Enforcement of awards and direction to execute settlements

How can the award for specific enforcement enforced?

Section 25. Application of preceding sections to certain awards and testamentary directions to execute settlements.-

The provision of this Chapter as to contracts shall apply to awards to which the Arbitration Act, 1940 (10 of 1940) does not apply and to directions in a Will or codicil to execute a particular settlement.

The section 25 makes the provision contained in Chapter II of Specific Relief Act, 1963, applicable to awards other than those made under Arbitration

Act, 1940, and also to directions to make settlement incorporated in any testamentary disposition i.e., Will or codicil.

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Chapter III

Rectification of Instruments

When an instrument can be rectified and who may claim rectification?

Section 26 when instrument may be rectified.-

(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing [not being the article of association of a company to which the Companies Act, 1956 (1 of 1956) applies] does not express their real intention, then-

(a) either party or his representative in interest may institute a suit to have the instrument rectified, or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified, or

(c) a defendant in any such suit as is referred to in clause (b), may in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading, and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be first for including such claim.

Illustrations

1. A intending to sell to B his house and one of the three godowns adjacent to it, executes a conveyance prepared by B in which, through B's fraud, all three godowns are included. One of the two godowns which were fraudulently included B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C but it cannot be rectified so as to affect D's lease.

2. By a marriage settlement A, the father of B, the intended wife covenants with C the intended husband, to pay to C, his executors administrators and assigns, during A's life an annuity of Rs. 5000 C dies insolvent and the official assignees claim the annuity from A. The court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

According to section 26, when an account of fraud or mutual mistake of the parties a contract or some other instrument in writing does not express the real intention of the parties, the court is empowered to rectify the instrument so as to give effect to the real intention of the parties, and then specifically enforce the rectified instrument.

Dagdu v. Bhana, (1904) 28 Bom 420: "The court observed that the court in administering equitable principles permits mistakes to be proved where there are common, that is, where the expression of the contract is contrary to the concurrent intention of the parties. If such mistake be established, then the court can give relief of rectification, but what is rectified is not the agreement, but the mistaken expression of it.

Wallington v. Townsend, (1939) 2 All ER 225: A, the owners of two adjoining bungalows, conveyed the East Bungalow to B, keeping the west bungalow with himself. The plan accompanying the conveyance showed a straight line boundary. But in fact to the east of the line there was bathroom and other domestic offices of the west bungalow. A's claim for rectification failed because the intention of both the parties was not same, while A did not intend to sell the said disputed strip B intended to buy it.

Who may Claim Rectification section 26(1)

1. The suit for rectification of instrument may be brought either by the parties thereto or by their representatives in interest.
2. The plaintiff may in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified, or
3. The defendant to any such suit in which the right arising under the instrument is in issue may, in addition to any other defence upon to him, ask for the rectification of the instrument.

Laxman v. Ganpat, 2 NCR 4: In the matter of rectification, the true question is what was the intention of the parties at the time of its execution and not what the parties intentionally omitted. The plaintiff must establish that the alleged intention to which he desires the document to be made conformable, continued concurrently in the minds of all parties down to the time of its execution. For, if the parties after an agreement changed their minds and it is their changed intention that is embodied in the instrument, there is no ground for rectification what is done on purpose, is obviously not done by mistake.

Discretion of the Court in Granting Rectification section 26(2)

If in any suit in which contract or other suit is sought to be rectified, the court finds that the instrument, through fraud or mistake does not express the real intention of the parties the court may in its discretion direct rectification of the instrument so as to express the intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Enforcement of Rectified Instrument section 26(3) & (4)

A contract in writing may be rectified as if the party claiming rectification has to prayed in his pleading and the court thinks fit, it may be specifically enforced. No relief for the rectification of an instrument shall be granted to any party under section 26, unless it has been specifically claimed.

However, where a party has not claimed any such relief in his pleading, the court shall at any stage of the proceeding allow him to amend the pleading, on such terms as may be just for including such claim.

Mistake

The mistake to form a ground for the relief of rectification must be mutual and not unilateral. A mistake on one side may be a ground of defence or a ground for rescinding a contract, but not for correcting or rectifying an instrument. The mistake may be either of fact or law although the court of equity will not generally grant relief against a mistake of law except where the mistake results in an inequitable relief.

New India Rubber Works (P) Ltd. v. Oriental Fire & General Insurance Co., (1969) 1 Comp LJ 153 (Cal): The principle of granting relief by way of rectification is that where a contract as finally made fails to express or embody the agreement between the parties as originally made, it can be had rectified so as to bring it in accord with the intention of the parties.

Thus, where the final draft mentioned the price in weight when in fact it was agreed to be in count and riot risk was mentioned in an insurance cover by mistake, the court allowed rectification.

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Chapter IV

Rescission of contracts

(Sections 27-30)

Discuss in brief the cases where rescission may be adjudged or refused?

Section 27. Where rescission may be adjudged or refused.-

(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases namely:-

(a) where the contract is voidable or terminable by the plaintiff,

(b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

(2) Notwithstanding anything contained in sub-section (1), the court may refuse to rescind the contract,-

(a) where the plaintiff has expressly or impliedly ratified the contract, or

(b) where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made, or

(c) where third parties have during the subsistence of the contract, acquired rights in good faith without notice and for value, or

(d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

Explanation.-In this section 'contract', in relation to the territories to which the Transfer of Property Act, 1882 (4 of 1882), does not extend, means a contract in writing.

Illustrations

(i) A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

(ii) A, an attorney, induces his client B, a Hindu widow to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument rescinded.

Prem Raj v. D.L.F. Housing and Construction (Private) Ltd., MANU/SC/0039/1968 : AIR 1968 SC 1355: A person who sues for rescission of contract cannot claim alternative relief of specific performance but a person who files the suit for specific enforcement can alternatively claim for rescission of contract.

Hungerford Investment Trust v. Haridas, AIR 1972 SC 1826: A party has an option to rescind a contract and no aid of the court is necessary in this behalf. The court only adjudicates upon the antecedent right of the parties. By grant of declaration that a contract has been validly rescinded he does not create a right in favour of a party.

Explain the rule laid down in section 28 with the help of suitable case-laws.

Section 28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.-

(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase-money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and no such application

the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court-

(a) shall direct the purchaser or the lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

(b) may direct payment to the vendor or lessor of all the rents & profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposits in connection with the contract.

(3) If the purchaser or lessee pays the purchaser money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely-

(a) the execution of a proper conveyance or lease by the vendor or lessor,

(b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The cost of any proceedings under this section shall be in the discretion of the court.

Section 28 applies to both the plaintiff-vendor and the defendant-vendor and it enables them to have the contract rescinded in the very action in which the decree for specific performance was made. The provision in section 28 of Specific Relief Act go to show that the Trial Court would have jurisdiction to extend the time for payment of purchaser price even if it had fixed a date for the same in the first instance in the decree originally passed.

Abdul Shaikh Sahib v. Abdul Rahiman Sahib, MANU/TN/0139/1922 : AIR 1923 Mad 284: The Madras High Court held that the decree for specific performance was in its nature a preliminary decree, the original court was keeping contract over the action and full power to make any just and necessary orders therein, including in appropriate case the extension of time.

M. Sakuntala Devi v. V. Sakuntala, MANU/AP/0160/1978 : AIR 1978 AP 337: It was observed by the Andhra Pradesh High Court that section 28 of the Specific Relief Act may be said to recognise the power of the court to extend the time prescribed by the decree for payment of purchase money, it does not expressly confer any power on the court to extend time. It does not purport to prescribe the conditions subject to which the court may allow further time than that prescribed in the decree for payment of the purchase-money.

Raman Kutty Guptan v. Avara, MANU/SC/1564/1994 : AIR 1994 SC 1699: Where the decree is transferred for execution to a transferee executing court, then certainly the transferee court is not original court and executing court is not the "Same Court" within the meaning of section 28 of the Code. But when an application has been made in the court in which the original suit was filed and the execution is being proceeded with, then certainly an application under section 28 is maintainable in the court.

Define Alternative prayer.

Section 29. Alternative prayer for rescission in suit for specific performance.-

A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled, and the court, if it

refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

Roopchand Chaudhari v. Ranjit Kumar: A person who sues for specific performance of the contract may alternatively sue for rescission of the contract, but a person who sues for rescission of a contract cannot sue alternatively for specific performance.

Vatsala Shankar Bansale v. Shambhaji Nanasabeh Khandore, MANU/MH/0708/2002 : AIR 2003 Bom 57: Where the court, while ordering specific performance in favour of the plaintiff, directed him to pay the balance amount within a specified date and that, on his failure to do so, his case would be dismissed, it was held on this failure to do so that the court could grant him extension of time.

Section 30. Court may require parties rescinding to do equity.-

On adjudicating the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

It is a maxim of law that "he who seeks equity must do equity" in the transaction in respect of which relief is sought so while decreeing rescission the court might direct not only payment of compensation to the defendant but also restoration of any benefit received by the plaintiff under the contract.

For example A, a money-lender, advances Rs. 100 to B an agriculturist, and by undue influence, induce B to execute a bond for Rs. 200 with interest at 6 per cent per month. The court may set the bond aside ordering B to repay

Rs. 100 with such interest as may seem just.

M. Mohamad Aslam v. CNA Gowthaman, MANU/TN/0812/2003 : AIR 2003 Mad 248: Where the purchaser deposited the money in the court as directed by the court, he was not allowed to withdraw it without first applying to the court for a direction to the vendor to execute, the sale deed, because until then it could not be said that the vendor had failed to comply with the order of the court.

Chapter V

Cancellation of instrument

(Sections 31-33)

In what circumstances an instrument may be ordered to be cancelled? Explain with the help of suitable case-laws and illustrations.

Section 31. When cancellation may be ordered.-

(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration

Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in her books the fact of its cancellation.

Illustrations

(a) A, the owner of a ship, by fraudulently representing her to be seaworthy induces B an underwriter, to insure her. B may obtain the cancellation of the policy.

(b) A conveys land to B who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him C may obtain the cancellation of the forged instrument.

(c) A, representing that the tenants of his land were all at Will, sells it to B and conveys it to him by an instrument, dated the 1st January, 1877 soon, after that day. A fraudulently grants to C a lease of part of the lands, dated the 1st October, 1876 and procures the land to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

(d) A agrees to sell and deliver a ship to B, to be paid for by D's acceptance of four bills of exchange, for sums accounting to Rs. 30,000 to be drawn by A or B. The bill are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the Bills. B may obtain the cancellation of all the bills.

Discuss the facts of Dayawati v. Madanlal Verma.

Dayawati v. Madanlal Verma, MANU/UP/0221/2003 : AIR 2003 All 276: A sale deed was executed in respect of an ancestral property. The transferor's sons challenged it and sought a declaration that the sale was null and void. There was nothing to show their ages and whether they had birth right in the property. They were not allowed to challenge it on the ground of the competence of the transferor. The suit was also time-barred because it could be filed only within 3 years of the cause of action whereas 13 years had already passed.

Prem Singh v. Birbal, MANU/SC/8139/2006 : (2006) 5 SCC 353: When a document is valid, no question arises of its cancellation. When a document is void ab initio a decree for setting aside the same would not be necessary as the same is non established in the eye of the law, as it is a nullity. Section 31 of the Specific Relief Act, 1963 refers to both void and voidable documents.

Section 32. What instrument may be partially cancelled.-

Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

Illustration

A draws a bill on B, who endorses it to C, by whom it appears to be endorsed to D who endorses it to B. C's endorsement is forged. C is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

It is necessary that the written instrument is evidence of different obligation which can be separated from each other. For example 'A' executes mortgage deed in favour of 'B'. A is able to procure the deed from B by fraud and makes therein an endorsement of receipt of Rs. 1200 appearing to have been signed by B. Thus signature of B is forged B is entitled to get the endorsement cancelled and may leave the deed to stand in other respect.

Explain the provision defined in section 33.

Section 33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.-

(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resists any suit on the ground-

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it,

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

According to section 33(1), when cancellation of instrument is granted, the court may require the plaintiff i.e., the party to whom the relief is granted,-

(i) to restore, so far as may be any benefit which he may have received from the other party, and

(ii) to make any compensation to him which justice may require.

Section 33(2) requires the defendant to restore benefit received by him and to pay compensation, when he resists the suit of enforcing an instrument against him. The provision deals with the situation whether the instrument sought to be enforced is voidable or void by reason of same having been executed by a person who is not competent to contract under section 11 of the Indian Contract Act, 1872.

Leslie v. Sheill, (1914) 3 KB 607: The doctrine of equitable restitution was propounded by Lord Sumner. According to this doctrine, if a minor acquires some property by fraudulently misrepresenting himself to be a major, then the minor can be compelled to restore the property to the person from whom he has obtained it provided that the property is specific. But restitution can be made upto a certain limit. The minor cannot be asked to make the repayment because that can be done on the basis of a contract and a minor's contract is void because a minor is not competent to contract. In the words of Lord Sumner: "Restitution stopped where repayment began".

Khan Gul v. Lakha Singh, ILR (1928) 9 Lah 70 (FB): The equitable jurisdiction is founded upon the desire of the court to do justice to both the parties by restoring them to the "status quo ante" and there is no real difference between restoring the property and refunded the money, except that the property can be identified but cash can't be treated.

As noted above section 33 applies to both void as well as voidable instruments of which cancellation is sought. According to section 65 of Indian Contract Act, 1872.

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received

any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustration

A pays, B 1000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of promise. The agreement is void but B must repay A the 1000 rupees.

Ajudhia Prasad v. Chandan Lal, MANU/UP/0066/1937 : AIR 1937 All 610: The Allahabad High Court considered at length the decision of the Lahore High Court and expressed entirely the opposite view. As regards the two points discussed which reflect that where the contract of property is void and such property can be traced, the property belongs to the promisee and can be followed. There is every equity in his favour for restoring the property to him. But where the property is not traceable and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor's pecuniary liability under the contract which is void.

Limitation.-

Article 59 of the Indian Limitation Act, 1963 prescribes a period of three years for a suit for cancellation of an instrument computable from the date when the fact entitling the plaintiff to have the instrument cancelled first becomes known to him.

Chapter VI

Declaratory Decrees

(Sections 34, 35)

What are the declaratory decrees and how the court can use this discretionary power?

Section 34 Discretion of court as to declaration of status or right.-

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.-A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and whom, if in existence, he would be a trustee.

Illustrations

1. A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for declaration that they are not entitled to the right so claimed.
2. A bequeaths his property to B, C and D "to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children". No such children are in existence. In a suit against A's executor, the court may declare whether B, C, and D took the property absolutely, or only for their lives, and it may also declare the interest of the children before their right are vested.

3. A covenants that if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.

4. A alienates to B property in which A had merely a life interest. The alienation is invalid as against C, who is entitled as revisioner. The court may in a suit by C against A and B declares that C is so entitled.

5. The widow or a sonless Hindu alienates part of the property of which he is in possession as such. The person presumptively entitled to pass the property if he survives her, may, in a suit against the alienee obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's life-time.

S. Madaswamy v. A.M. Arjuna Raja, MANU/TN/0443/2000 : AIR 2000 Mad 465: It has been held that in a suit for declaration of title and consequential injunction, the burden is on the plaintiff to prove his right and possession over property. If the plaintiff fails to prove his clear title to property he is not entitled to such declaration and the consequential injunction.

Smt. Suman Mahajan v. Kusum Sandhu, AIR 1999 Del 314: One Gobind Kaur executed a duly registered Will dated 14-2-1984 whereby she bequeathed certain property in favour of the plaintiff, Smt. Kusum Sandhu, who was her daughter-in-law. Smt. Govind Kaur died on 29-9-1986, and thereby the plaintiff became the absolute owner of the said property.

The plaintiff went abroad in June 1988 for sometime. In her absence one of the defendants, who happened to be the tenant of a part of that property, took unauthorised possession of the portion which was the plaintiff and started raising construction thereon. In a suit for possession by the plaintiff the defendant contended that the deceased had entered into an agreement to sell that property to the defendant and the defendant had paid due consideration for the same. The defendant failed to prove the fact of agreement and also the payment of alleged consideration.

It was held that the plaintiff was entitled to the said property and also to regain the possession thereof.

When suit for declaration does not lie.-A suit for declaration will not lie in the following cases,-

(i) for a declaration that the plaintiff did not infringe the defendant's trade mark. Negative declaration will not be allowed.

(ii) for a declaration that a disposition made by the father of the plaintiff in a Will is invalid and that the property is ancestral and that the plaintiff is entitled to a share in it.

(iii) for a declaration, during the life-time of the testator, that the Will is invalid. The reason is that the Will is revocable and no property is transferred during the life-time of the testator.

(iv) for the declaration that the plaintiff is a purchaser under an unregistered deed of sale.

(v) no declaratory suit lies to set aside a succession certificate granted under Act XXVII of 1860. (The new Act is Indian Succession

Act, 1925).

M.P Mathur v. D.T.C., MANU/SC/8606/2006 : AIR 2007 SC 414: The discretion under this section which the court has to exercise in a judicial discretion. That discretion has to be exercised on well-settled principles. Therefore, court has to consider-the nature of obligation in respect of which performance is sought, circumstances under which the decision came to be made, the conduct of the parties and the effect of the court granting the decrees.

Rashmeet Kaur Kohli v. C.B.S.E., AIR 2007 Del 46: Discretionary relief can be declined if person seeks to change name very frequently or wants change of name to circumvent rules and bye-laws.

Indian Navigation Co. v. Haryana State Industrial Development Corporation, AIR 2006 P&H 29: The use of expression "any right as to any property" is very wide because it shows that it is not necessary for the plaintiff to claim any right

in the property and it would be enough if the right he claimed is related to the property in question. It includes any right relating to any property which may also be contingent right.

What are the effects of declaration in decrees?

Section 35. Effect of declaration.-

A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of declaration, such parties would be trustee.

Example.-A, a Hindu, in a suit to which B, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnised and an order for the restitution of conjugal rights. The court makes the declaration and order. C claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

Chapter VII

Injunctions Generally

(Sections 36-37)

Define injunction.

Injunction.-

An injunction is a specific order of the court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun, or in some cases, when it is called mandatory injunction commanding active restitution of the former state of things.

Barney's Encyclopaedia of the law of England.-It is defined as a judicial process by which one, who has invaded or is threatening to invade the rights (Legal or equitable) of another, is restrained from continuing or commencing such wrongful act.

Lord Halsbury.-

An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing.

Story says.-

If one were disposed to be scrupulously critical on such a subject, he might object to the apparent contract between justice in the first part of the sentence and equity and good conscience in the latter. This truth is that in this connection the words have the same identical meaning.

Joyce.-

"An order remedial, the general purpose of which is to restrain the commission or continuance of some wrongful act of the party informed."

Injunction acts in personal. It does not run with the property. For example. A, plaintiff secures an injunction against B forbidding him to erect a wall. A sells the property to C. The sale does carry the injunction with the property.

An injunction may be issued for and against individuals, public bodies or even the state. Disobedience of an injunction is punishable as contempt of court.

Characteristics

- 1 It is a judicial process,
- 2 the relief obtained thereby is a restraint or prevention, and
- 3 the act prevented or restrained is unlawful

Injunction will not be Issued in Cases

In what cases the injunction is not issued?

1. where damages are the appropriate relief,
2. where injunction is not the appropriate relief,
3. where the plaintiff is not entitled to an injunction on account of his conduct.
4. where contract cannot be specifically enforced.
5. where injunction would operate inequitably.

Section 36. Preventive relief how granted.-

Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

What is preventive relief? Give examples also.

What is preventive relief.-

Preventive relief is said to be such a relief by which a person is prevented to do an act, which he is not validly liable to do. For example. A is constructing a wall in B's land. At the suit of B by providing him preventive relief A can be prohibited to do so because A is not legally liable to do so. Thus when the court prevents a party from doing that which he is under an obligation not to do it is called preventive relief. Such relief is usually granted to prevent breach of contract or the violation of right arising otherwise than by contract.

The object of issuing an injunction, it should be noted is usually preventive. Through preventive injunction, a party is ordered to restrain from doing a wrongful act or thing which he is under an obligation not to do.

Executive Committee of Vaishya Degree College, Shamli v. Lakshmi Narain, MANU/SC/0052/1979 : AIR 1976 SC 888: The relief of injunction cannot be granted or obtained as of right. The granting of relief of injunction is discretionary. The relief has to be granted by the court according to sound legal principles and ex debito justitiae.

What are the kinds of injunctions?

Section 37. Temporary and perpetual injunction.-

(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908 (5 of 1908).

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit, the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Temporary or interlocutory injunction are to continue temporarily either until a specified time or until further order of the court. It is only provisional in nature.

Ram Kishun v. Jamuna Prasad, (1951) 6 DLR 22 (Pat): There may be an order to preserve the property until the final hearing of the case. The object may be to maintain status quo. So that the alleged harm is avoided, which could otherwise occur until the case is finally disposed of by the court on merits.

Bruce v. Silvaraj, (1987) Supp SCC 161: A person filing a suit for injunction can succeed only when he is in possession of the property. If he is not in possession of the property, or adverse possession has not been confirmed an injunction cannot be issued in his favour.

Kallappa and Lunda Ram v. Shivappa Aparaj, MANU/KA/0042/1995 : AIR 1995 Kant 238 (243): Where the plaintiff is in possession of the property and the possession is not illegal and that there is no evidence that the possession before the suit has been obtained by unfair means, injunction, without declaration can be issued.

Chapter VIII

Perpetual injunctions

(Sections 38-42)

Discuss the factors in which courts may grant perpetual injunction.

Section 38. Perpetual injunction when granted.-

(1) Subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) when any such obligation arise from contract, the court shall be guided by the rules and provisions contained in chapter II.

(3) when the defendant invades or threaten to invade the plaintiff's right to or enjoyment of property, the court may grant a perpetual injunction in the following cases, namely,-

(a) where the defendant is trustee of the property for the plaintiff.

(b) where there exist no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion,

(c) where the invasion is such that compensation in money would not afford adequate relief,

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Illustrations

1. A lets certain land to B, and B contracts not to dig sand or gravel there-out. A may sue for injunction to restrain B from digging in violation of his contract.

2. A trustee threatens to a breach of trust. His co-trustee, if any, should, and the beneficial owner may, sue for an injunction to prevent the breach.

3. The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

4. The directors of a fire and insurance company are about to engage in Marine Insurance Co. Any of the shareholders may sue for an injunction to restrain them.

5. A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The court may grant an injunction to restrain him from getting in the assets.

6. A trustee for B, is about to make an important sale of small part of the trust property. B may sue for an injunction to restrain the sale even though compensation in money would have afforded an adequate relief.

7. A is B's medical advisor. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as patient. This is contrary to A's duty and B may sue for an injunction to restrain him from so doing.

8. A lets certain arable lands to B for purpose of husbandry, but without any express contract as to mode of cultivation. Contrary to the mode of cultivation customary in the district. B threatens to sow the lands with seeds injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the land in contravention of his implied contract to use them in a husband like manner.

9. A, B and C partners, the partnership being determinable at Will. A threatens to do an act tending to the destruction of the partnership property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the Act.

10. A, a Hindu widow in possession of her deceased husband's property commits destruction of the property without any cause sufficient to justify her in so doing. The heir expectant may sue for an injunction to restrain her.

Sunil Kumar v. Ram Prakash, MANU/SC/0521/1988 : AIR 1988 SC 576: The Supreme Court observed that a suit for permanent injunction by a coparcener against the father for restraining him from alienating the house property belonging to the joint Hindu family for legal necessity was not maintainable because the coparceners has got the remedy challenging the sale and getting it set aside in a suit subsequent to the completion of the sale.

Cotton Corporation of India Ltd. v. United Industrial Bank Ltd., MANU/SC/0375/1983 : AIR 1983 SC 1272: An interim relief can be granted only in aid of and as ancillary to the main relief. If find relief cannot be granted in the terms sought for, a temporary relief of the same nature cannot be granted.

Saraswathi Ammal v. Viveka Primary School, MANU/TN/0737/2001 : AIR 2001 Mad 417: The tenant filed a suit to obtain permanent injunction to a restrain the landlord from evicting him permanently. It was held that such an action was not maintainable as it was aimed at casting embargo on landlord's right to enjoy legal right in respect of his property.

Kanahiyalal v. Babu Ram, AIR 2000 SC 3507: The Supreme Court has been held that in a suit for permanent injunction regarding partition of property, the partition deed contemplated giving use of gallery to one of the co-owners. It was held that condition in the partition deed binds not only the two co-owners but their successor-in-interest also. Hence issue of permanent injunction restraining successor in interest of the other co-owner was valid.

Kaliappan v. Durai, AIR 1988 Mad 65 (67): When the plaintiff seeks injunction to restrain defendants from encroaching on his property having entitlement in Government poromboke lands and the defendants are encroaching upon said lands and putting thereon thatched huts, since the said encroachment is very near to plaintiff's is land, he apprehends encroachment upon his land, in such circumstances the plaintiff would be entitled to permanent injunction restraining defendants from encroaching or interfering with peaceful possession of plaintiff's property.

M.S. Madhusoudhanan v. Kerala Kaumadi Pvt. Ltd., AIR 2004 SC 909: The Supreme Court observed that this strange piece of reasoning appears to proceed on the basis that the period of limitation for extinction of a possessory right is two years which it is not

Ramji Rai v. Jagdish Mallah, MANU/SC/8755/2006 : AIR 2007 SC 900: Where in a suit for permanent injunction to restrain interference with possession, no proper for declaration of title against the plaintiff made, it has been held by the Supreme Court that in such suits prayer for declaration of title was not necessary. The court should, in such suits, confine their finding regarding possession only. Any finding on title is not required to be made.

Maria Colaco v. Alba Flore Herminda D'Souza, MANU/SC/7170/2008 : AIR 2008 SC 1965: Where after the death of owner, plaintiff is in possession of the property and the defendant assumes contract and makes construction but on protest by the plaintiff, the defendant stops the construction for sometime, it reflects that the defendant is not sure of his title or rights hence in such a case grant of injunction for restraining the defendant will not be improper.

Define Mandatory injunction. Explain illustrations also.

Section 39. Mandatory Injunction.-

When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Illustrations

1. A, by new building obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act. B may obtain an injunction, not only to restrain A from doing on with the Buildings but also to pull down so much of them as obstruct B's lights.

2. A builds a house with eaves projecting over B's land B may sue for an injunction to pull down so much of the eaves as so project.

3. A is B's medical advisor. He demands money of B which B declines to pay. A then threatens to make known the effects of B's communications to him as a patient. B may sue for an injunction to restrain him from so doing. The court may also order A's letter to be destroyed.

4. A, a very eminent man writes letter on family topics to B. After the death of A and B, C who is B's residuary legatee, proposes to make money by publishing A's letters. D who is a A's executors, has a property in the letters, and may sue for an injunction to restrain C for publishing them. The court may also order A's letter to be destroyed.

5. A threatens to publish statements concerning B which would be punishable under chapter XXI of Indian Penal Code, 1860. The court may grant an injunction to restrain the publication, even though it may be shown not be injurious to restrain the publication.

6. A, being B's medical advisor, threatens to publish B's written communication with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

7. In the cases mentioned in 5 and 6 to this section, the court may also order the copies produced by piracy, and the trade marks statements and communications, therein respectively mentioned to be given up or destroyed.

A mandatory injunction forbids the defendant to permit the continuance of a wrongful state of things by ordering to under that which has been done or to do a particular act to restore things to their former condition.

According to shell- Mandatory injunction is an injunction to restrain, that continuance of some wrongful omission justice can be done by issuing a mandatory injunction ordering the act to be undone.

T. Prasad v. P.D. Punnoose, MANU/KE/0032/1995 : AIR 1995 Ker 157: The plaintiff sued for injunction against the defendant for restraining him from destroying the boundaries of his property. The evidence showed that by trespass the defendant had not only in disregard of the property rights of the plaintiff had destroyed the boundary wall of the land of the plaintiff but also that the trespass was continuing. The Trial Court granted permanent prohibitory injunction.

In a suit for mandatory injunction, the burden of proof lies on the plaintiff. If he fails to discharge the burden, he will not be entitled to the relief of injunction. He cannot get the relief of injunction on the ground that the defendant has failed to prove his case.

S. Narayana Rao v. R. Narsinga Rao, MANU/KA/0003/1995 : AIR 1995 Kant 11: Where in a permanent suit for injunction, restraining the defendants from causing nuisance to plaintiff by construction of septic latrines, the injury was actionable per se, the damages could be presumed.

What are the cases in which injunction can be refused?

Section 41. Injunction when refused.-

"An injunction cannot be granted:

- (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;
- (c) to restrain any person from applying to any legislative body;
- (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
- (e) to prevent the breach of a contract the performance of which would not be specifically enforced;

- (f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
- (g) to prevent a continuing breach in which the plaintiff has acquiesced;
- (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;
- (i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;
- (j) when the plaintiff has no personal interest in the matter."

Illustrations

(a) A seeks an injunction to restrain her partner, B from receiving the partnership debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B to assess them. The court will refuse the injunction.

(b) A manufactures and sells crucibles, designating them as "patent plumb-age crucibles" though in fact they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(c) A sells an article called "Mexican Balm" stating that it is compounded of diverse rare essence, and the sovereign medical qualities. B commence to sell a similar article to which he gives a name and description such as to lead people into belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the same, B shows that A's Mexican Balm consists of nothing but scented hog's lord. A's use of description is not an honest one and he cannot obtain an injunction.

Premji Rataney Shah v. Union of India, MANU/SC/0819/1994 : (1994) 5 SCC 547 (550): Under section 41, the interest of right not shown to be in existence, cannot be protected by injunction.

Section 42. Injunction to perform negative agreement.-

"Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement expresses or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement:

Provided that the plaintiff has not failed to perform the contract so far as it is binding on him."

Illustrations

(a) A contracts to sell to B for Rs. 1000 the goodwill of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1000 but A carried on the business in Calcutta. The court cannot compel A to send his old customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(b) A contracts to sell B the goodwill of a business. A then sets up a similar business class by B's shop and solicits his old customers to deal with him. This is contrary to his implied contract and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their goodwill may be withdrawn from B.

(c) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(d) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

Kerr Observes.-If there is a negative covenant, the court has as a general rule, no discretion to exercise.....unless proceedings have been taken or are threatened against the vendor to enforce the restrictive covenants, the vendor has no cause of action for the purchaser's breach of his covenant.

Section 42 presupposes that a contract is composed of three ingredients-

- (a) an affirmative agreement to do certain act,
- (b) a negative agreement not to do a certain act and the negative part must be capable of being separated from the rest of the contract, and
- (c) the plaintiff must have fully carried out his part of the contract.

Conditions necessary for the applicability of section.-It is essential-

- (1) the contract should comprise of two agreements, one affirmative and the other negative,
- (2) both the agreements must be divisible,
- (3) the negative agreement must relate to a specific act, it should not be general negative of a stipulation,
- (4) the court should be unable to compel specific performance of the affirmative agreement,
- (5) the plaintiff must not have failed to perform the contract so far as it is binding on him.

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